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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

BOOTSTRAP TRADING CO., INC.,
Petitioner,

vs.

PHOENIX TALLOW COMPANY and
MARICOPA BY-PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Bootstrap Trading Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered September 14, 1972.

OPINIONS BELOW

The opinions of the Courts below are not published. The opinion of the Court of Appeals is printed in Appen-

dix A. The opinion of the Court of Appeals treating petitioner's timely filed response to the motion to dismiss the appeal as "a motion to set aside the judgment" is printed in Appendix B. The opinion of the Court of Appeals staying the mandate pending the outcome of this petition is printed in Appendix C. The opinion of the District Court directing a verdict against petitioner is in the form of a minute entry which is retyped from the docket and printed as Appendix D. The opinion of the District Court denying petitioner's motion for a new trial is printed in Appendix E. The opinion of the District Court denying petitioner's motion for an extension of time to file the trial transcript is printed in Appendix F.

JURISDICTION

The jurisdiction of the District Court was based on 15 U.S.C. 15. The judgment of the Court of Appeals was entered on September 14, 1972. Petitioner's timely filed response to the motion to dismiss was treated by the Court of Appeals as "a motion to set aside this court's order of September 14, 1972" and was denied on September 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether or not the Court below without any statement of its reason departed from accepted and usual judicial practice by denying petitioner 90 days from the filing of the notice of appeal or until the Court stenographer could

type the trial transcript in which to file the trial transcript, where no previous extensions were sought, where failure to file resulted directly from a civil litigant's financial inability to make *immediate* advance payment of the cost of the trial transcript where the questions presented on appeal were substantial, and where the record shows no intent to abandon the appeal nor any prejudice to respondents.

STATEMENT OF THE CASE

A. Complaint

This is a private antitrust action brought under Section 4 of the Clayton Act (15 U.S.C. 15) alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2). Petitioner was an independent renderer in Phoenix, Arizona. The rendering industry is one in which a renderer purchases raw materials, namely, fats, bones, and grease from customers, usually, grocery stores, butcher shops, and slaughterhouses, and processes the material. The finished product, called tallow or meal, is used for the manufacture of many products, including soap, plastics, and livestock feed. After raw materials are processed, the finished product is sold both locally and in interstate commerce. The complaint alleged that respondents combined and conspired to restrain trade and to monopolize and did in fact monopolize 100% of rendering industry in Phoenix, Arizona, and that, as a result of these violations of the antitrust laws, petitioner was eliminated from the industry. The petitioner claimed that it could not continue to stay in business by reason of the dominant position of the re-

spondents jointly acquired in the industry because of their monopolization of raw materials, their allocation of customers, their fixing of identically high predatory prices paid to customers, the effect of which was to eliminate the petitioner.

B. Parties

(1) Petitioner was a family-held Arizona corporation operating under the name Bootstrap Trading Company, hereinafter Bootstrap. Mr. Emil Kohn was the "guiding light" in Bootstrap throughout its six year duration. He came with his family to Arizona from the East in the early 1960's, and brought with him an extensive and practical knowledge, background and experience in the rendering industry. Kohn successfully managed a family operation for 17 years and served with distinction for a number of years on the Board of Directors of the National Rendering Association and the chairmanship of that Association's Cost and Accounting Sub-committee.

After his arrival in Arizona, Kohn challenged respondents' monopoly position by attempting to enter the rendering business.

Kohn's immediate resistance came from the two chief executive officers of the respondents. They threatened Kohn not to go into business in Phoenix. When petitioner argued that this was a free country he was told by respondents that losses in Phoenix would be subsidized from profits derived from other multistate rendering operations of one of the respondents as long as petitioner attempted to stay in business in Phoenix. Kohn was also shown a yard full of old rendering equipment which he

was told was the equipment of past competitors of one of the respondents.

When Kohn persisted, respondents contacted banks which had agreed to finance Kohn, the result of which was that certain banks withdrew their previous commitments to Kohn. Petitioner eventually was able to borrow a small amount of an original commitment from one of the banks. These bank contracts by respondents against Kohn were specifically authorized in the minutes of the respondents' Board of Directors meetings.

The respondents policed Kohn's activities. With each step taken by Kohn including his incorporation, his purchase and later lease of land site, and the construction of his plant, the respondents simultaneously increased prices paid to suppliers whom respondents had allocated between themselves.

The respondents constantly met at each others plants, at restaurants, and at other places. They discussed the (1) petitioner's entry into the market, (2) the petitioner's suppliers, (3) the prices they paid for raw material, finished product prices, and prices charged local customers who purchased finished product. The respondents spoke frequently on the telephone, entered into covenants not to compete, and tolling agreements during each other's plant shutdowns. During the relevant time, respondents consistently priced well above the market in the face lower fluctuating finished product prices.

Still, Kohn was able to at least secure enough supply to be able to run his plant at one-half its capacity. Respondents thereupon, and for the first time and against

their own company policy, entered into exclusive contracts with major suppliers which had the effect of eliminating and foreclosing the petitioner and, in the case of the single principal supplier in Phoenix, the refusal by that supplier to continue to deal with Kohn because of respondents' "all or nothing" arrangement.

Nonetheless, Kohn was able to remain in the market, though he was losing substantial money and in danger of losing the approximate $250,000 investment secured from family members, friends, and the sale of his share of a rendering business on the East Coast. At this time, respondents approached Kohn, congratulated him for staying in business, and invited Kohn "to join the church" by allocating to him a monopoly of all grease in Phoenix if Kohn would agree not to compete for the principal raw materials, fat and bones. When Kohn refused, he was threatened that respondents had "not begun to fight."

In 1967, Kohn's plant burned down from undetermined causes. Nonetheless, Kohn remained in business for another year and half. Kohn requested the respondents to process his raw material for him. For a short time, and on the advice of their counsel, the respondents processed Kohn's material, but at discriminatory prices; they then refused to deal with Kohn altogether. Kohn was temporarily able to secure the cooperation of the renderer in Tucson, Arizona, to process Kohn's raw material. After two weeks, the Tucson renderer refused to deal with Kohn, assigning as his reason that the respondents threatened to enter the Tucson market and compete against the Tucson renderer if he continued to deal with petitioner.

For the remaining year and a half petitioner bought materials and daily transported raw materials 300 miles to California for processing. Having lost the entire investment, Kohn continued in business by renting trucks so that he could continue to at least haul raw materials to California for processing. The petitioner finally went out of business in February, 1969, after the last of petitioner's rented trucks broke down on the way to California. Prices in Phoenix then returned to market and below market levels.

Petitioner brought suit under the antitrust laws in August, 1969.

(2) *Respondents.*

The respondent Phoenix Tallow is a wholly owned subsidiary of Baker Commodities. Baker Commodities is a corporation engaged in the rendering business and has processing plants in, among other places, Phoenix, Arizona; Los Angeles, California; Albuquerque, New Mexico.

The respondent Maricopa By-Products is a closely-held Arizona corporation engaged in the rendering business in Phoenix, Arizona. Maricopa is the parent corporation of Tempe Meat Company, a slaughterhouse in Tempe, Arizona and a major source of supply for raw materials. During the relevant time, Maricopa admitted that Tempe was a "captive market", and Tempe was paid substantially less for raw materials than respondents' predatory prices to other suppliers.

C. Chronological Sequence of Procedures.

(1) In The District Court.

On *August 26, 1969,* the petitioner filed its Complaint under Section 4 of the Clayton Act (15 U.S.C. §15) alleging injury by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§1, 2). On October 23, 1969, petitioner filed its amended complaint. On November 17, 1969 the respondent Maricopa By-Products filed its Answer. On December 2, 1969, the respondent Phoenix Tallow filed its Answer.

Discovery continued without surcease for two years. Tens of thousands of documents were produced and inspected. Thirty-eight depositions were taken, including eight volumes of the petitioner's chief executive officer. The pretrial was extensive and included, in addition to pleadings, a hearing before the presiding Judge at which testimony was taken. (A copy of the docket entries is attached as Appendix F.)

On *January 13, 1972,* the trial began before a jury of six with four alternates, the Honorable William Copple, Judge, presiding.

On *February 1, 1972,* the trial court erroneously ordered that "Kohn's testimony re market penetration, profit and price formula, and damages is stricken," and further granted a directed verdict against the petitioner for failure to prove with mathematical certainty the amount of its damages. The jury was dismissed and Judgment was entered against the petitioner that day.

On *February 9, 1972,* petitioner filed its motion under Rule 59 F.R.Civ.P. for a new trial on the ground that the Court erred in striking petitioner's testimony

regarding the amount of his damage, that even if that ruling were correct that substantial economic evidence aliunde existed in the record from which a jury could make a just and reasonable estimate of the amount of petitioner's damages, and for other rulings by the trial court relative to the exclusion of evidence, compartmentalizing petitioner's suit, and erroneous findings of fact.

From *February 11 until March 2*, the parties briefed and argued motions on taxation of costs.

On *February 28, 1972,* nine days after the time permitted by the local rules, the respondent Maricopa filed its response to petitioner's motion for a new trial.

On *March 2, 1972,* the respondent Phoenix Tallow, twelve days after the time allowed under the local rules, filed its response to petitioner's Rule 59 motion.

The hearing on petitioner's motion was delayed, set and reset from *March 6th to March 20th to April 3rd* to suit the convenience of the respondents to attend the hearing on the motion for a new trial, and to permit the petitioner to reply to respondents' late filings.

On *May 8, 1972,* the Court denied petitioner's motion without the reason for the denial, and further found as fact, without any briefing or oral argument on the post trial motion, that the petitioner had failed to prove and the jury could not find that the acts of the defendants were in or affected interstate commerce.

On *May 25, 1972,* petitioner tendered to the Clerk both its notice of appeal and its motion for leave to appeal in forma pauperis. The petitioner did not pay the $5.00 filing fee on the basis of its motion for leave to appeal in

forma pauperis. The clerk declined to file the notice of appeal despite this Court's holding in *Parissi v. Telechron*, 349 U.S. 46 (1955), and instead "lodged" the notice of appeal. The motion for leave to appeal in forma pauperis was filed the same date and had the same effect as a notice of appeal. *Tesciona v. United States*, 141 F.2d 811 (9th Cir., 1944); *Shannon v. U.S.*, 206 F.2d 479 (D.C. 1953).

On *June 12, 1972*, the hearing date set on petitioner's motion to proceed in forma pauperis, the petitioner withdrew its motion on the advice of counsel that the authority presented by respondents convincingly showed that such a motion was not available to corporations, even though, for all intents and purposes, the petitioner's chief executive officer was the corporation. The lower court thereupon ordered that the petitioner was allowed 10 days within which to file an appeal bond. Petitioner's officer thereupon contacted the Court Reporter to order the trial transcript. The court reporter estimated that $2600 would be required before he would type the transcript. Kohn thereupon sought to raise the estimated $2600 prepayment.

On *June 20, 1972*, within the 10 days allowed by the lower Court, the petitioner's cost bond on appeal was timely received and filed. On the same date, the clerk was paid the filing fee, and the clerk "filed" the notice of appeal.

On *June 26, 1972*, the petitioner filed its designation of the record on appeal.

From *June 12, 1972*, after contacting the court stenographer to *July 25, 1972*, petitioner's chief executive officer

attempted to raise the estimated prepayment of $2600 for the trial and post trial transcript. By *July 25th,* petitioner's officer had raised and deposited $2400 with the clerk to be held for payment of the transcript.

On *July 25, 1972,* an associate of petitioner's San Francisco counsel[1] circulated to respondents' Los Angeles and Phoenix counsel the agreed stipulation that the District Court might temporarily retain the record on appeal for use by the parties in preparing the appeal papers. Rule 11(c) F.R.App.P. The stipulation was signed by all counsel and filed on August 7, 1972. *On the same date, July 25, 1972,* an associate of petitioner's counsel in San Francisco placed in the mail the petitioner's motion for an extension of time to transmit the record on appeal. The petitioner requested the Court to grant the extension to August 23, 1972, 90 days after the filing of the Notice of Appeal on May 25, 1972 or until the transcript could be completed, on the ground that the trial and post trial transcript, designated as part of the record, could not be prepared on time because (1) the official court reporter was on vacation and could not in any event complete the transcript until the last week in September, and (2) the petitioner's officer had spent considerable time in raising the $2,400.

On *July 27, 1972,* petitioner's motion was "lodged." On July 31, 1972, petitioner's motion was filed.

On *August 7, 1972,* the lower court denied petitioner's motion to extend the time to file the transcript of the record on the ground that the petitioner (1) had only

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[1]Petitioner's trial counsel was in trial in the Federal District Court in Atlanta, Georgia from May 28, 1972 to August 2, 1972.

paid $2400 of the estimated $2600 transcript prepayment cost and therefore had not technically "ordered" the transcript under Rule 10(b) F.R.App.P. and (2) the lower court questioned the "truthfulness" of the petitioner's original motion for leave to proceed in forma pauperis. A copy of the Order was mailed to and received by counsel in San Francisco, California.

(2) In The Court of Appeals.

On *August 11, 1972,* petitioner's motion in the Court of Appeals to extend the time to file the transcript of the record and to docket the appeal was lodged pending receipt of the preliminary record from the District Court. Petitioner paid the filing fee. The grounds of the motion were that good cause existed, including the fact that the Court Reporter could not transcribe the transcript before the last week of September, a substantial question as to the correctness of the judgment below was presented, there could be no showing that petitioner abandoned the appeal or in any way failed to do all it could to perfect its appeal, and the lack of prejudice to the respondents.

On *August 11, 1972,* the Ninth Circuit Court of Appeals ordered the respondents to reply to petitioner's motion within 7 days.

On *August 22, 1972,* 11 days later, the respondent Phoenix Tallow responded. Respondent did *not* deny the good cause shown by petitioner to extend the time to file the transcript, did *not* deny the fact that a substantial question as to the correctness of the judgment below existed, did *not* deny that it would in no wise be prejudiced by an extension of time, and did *not* deny that no

showing could be made that petitioner in any way abandoned its appeal. Instead, by placing the cart before the horse, respondent argued that all petitioner had to do was to pay the $25.00 docket fee, despite the fact that there can be no docketing where there was no record and there was no record because the transcript had not been typed, and petitioner had moved for an extension of time in which to file the record so that the transcript could be typed.

On *August 22, 1972*, 11 days later, the respondent Maricopa filed its response to petitioner's motion and also filed its motion to dismiss the appeal. Like respondent Phoenix Tallow, respondent Maricopa did *not* deny the good cause shown by petitioner to extend the time to file the transcript, did *not* deny the fact that a substantial question as to the correctness of the judgment below existed, did *not* deny that it in no wise would be prejudiced by an extension of time, and did *not* deny that no showing could be made that petitioner in any way abandoned its appeal. Instead, like respondent Phoenix Tallow, respondent Maricopa argued that petitioner had not paid $25.00 docket fee, though there could be no docketing until the transcript was filed, and it was an extension of time to file the transcript that was the only subject of the petitioner's motion. Respondent Maricopa further argued that petitioner's deposit of $2400 with the Clerk was $200 short of the estimated $2600 prepayment and therefore petitioner had not "ordered" the transcript. As grounds for its motion to dismiss, respondent argued (1) petitioner failed to timely transmit the record (without denying petitioner's good cause, the

substantial question of the judgment below, the lack of prejudice to respondents, and the lack of any showing that petitioner had in any way abandoned the appeal); (2) petitioner had failed to timely file a notice of appeal (despite *Parissi v. Telechron,* supra, and the filing the same day of petitioner's motion to proceed in forma pauperis which, in addition to the notice of appeal, is itself a notice of appeal, *Tesciona v. United States,* supra, *Shannon v. United States,* supra); (3) petitioner proceeded in bad faith because the petitioner's motion for forma pauperis voluntarily withdrawn by petitioner was untruthful (citing the lower Court's disbelief of petitioner's officer, which should not be authority since the lower Court's constant disbelief of petitioner's officer, culminating in lower Court's striking of petitioner's testimony on damages, directing a verdict, and making findings of fact, were the very issues on the appeal's merits); (4) petitioner failed to timely file a cost bond (without noting the lower Court's order of June 12 allowing petitioner 10 days in which to file a cost bond, which petitioner did on June 20); (5) petitioner's failure to provide a sufficient bond supported by a memorandum of determination by the Clerk that petitioner's pro forma bond, on file for two months, was deficient (the day before respondent's motion to dismiss the appeal, respondent, without notice to petitioner much less a hearing, moved and received that very day the clerk's memorandum, and the petitioner's *first knowledge of the respondent's motion and the clerk's simultaneous decision was as an exhibit to respondent's very motion to dismiss the appeal.* The petitioner did not, because time did not permit, question the

manner or validity of the decision, but rather filed a new bond); (6) petitioner "should have" been able to raise the entire estimated $2600 rather than just $2400; and (7) the fact that petitioner's trial counsel was in trial in the Federal District in Atlanta, Georgia, from May 28, 1972 to August 2, 1972 was no excuse (petitioner *never* claimed counsel's involvement with other matters as an excuse, the only ground of petitioner's motion being that the trial transcript could not be completed in time and petitioner had spent considerable time raising $2400 for the transcript.)

On *August 28, 1972,* petitioner filed its reply to Maricopa's motion to dismiss the appeal.

On *September 1, 1972,*[2] the respondent Phoenix Tallow filed its motion to dismiss the appeal on the grounds that (1) petitioner's motion for leave to proceed in forma pauperis which was withdrawn by petitioner was "untrue" and (2) the Notice of Appeal was untimely.

On *September 14, 1972,* before the time in which petitioner was allowed to respond to Phoenix Tallow, the Court of Appeals granted respondents' motions and dismissed the appeal, and denied petitioner's motion for an extension of time until 90 days after the Notice of Appeal or until the trial transcript could be typed. On the same day, petitioner filed its reply to the respondent Phoenix Tallow.

On *September 19, 1972,* the Court of Appeals treated petitioner's timely reply of September 14th to the motion

[2]Late Friday afternoon before the Labor Day holiday.

to dismiss as a motion "to set aside" the dismissal, and denied petitioner's "motion".

On *September 22, 1972,* petitioner moved to stay the issuance of the Judgment of the Court of Appeals pending a petition to the Supreme Court.

On *September 27, 1972,* the Court of Appeals stayed its mandate pending the outcome of this petition.

REASONS FOR GRANTING WRIT

I

RULE 12(c) F.R.APP.P. SHOULD BE USED SPARINGLY, ESPECIALLY IN COMPLEX LITIGATION WHERE THE RECORD IS EXTENSIVE, AND ONLY WHERE IT AFFIRMATIVELY APPEARS THAT AN APPEAL HAS BEEN ABANDONED OR OTHERWISE FRIVOLOUS ALL TO THE RESPONDENT'S PREJUDICE.

A. Summary of Argument.

The Court of Appeals erred in dismising petitioner's appeal under Rule 12(c) F.R.App.P. by denying petitioner's first and only motion under Rule 11(d) F.R.App. P. to have until 90 days after the filing of the notice of appeal or until the stenographer could type the transcript in which to file the transcript (1) where more than the usual good cause existed and was shown, 9 Moore's Fed. Prac. ¶211.10[1] at 1819, (2) where a substantial question as to the correctness of the judgment below was presented, *Pyramid Motor Freight Corp. v. Ispass,* 330 US 695 (1947), including the deprivation of the petitioner's right to trial by jury despite this court's decisions in *Beacon Theaters, Inc. v. Westover,* 359 US 500 (1959) and *Continental Ore*

v. Union Carbide and Carbon Corp., 370 US 690 (1962) and the finding of fact and the rulings as a matter of law that the petitioner, a victim of duly established violations of the antitrust laws, could not recover because it failed to prove with mathematical certainty the amount of its damages despite this Court's decisions in *Eastman Kodak Co. v. Southern Photo Materials,* 273 US 359 (1927), *Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 US 555 (1931), and *Bigelow v. RKO Pictures,* 327 US 251 (1946), (3) where there was no showing, nor could there be, that the respondents would in any way be prejudiced by the extension, *Saint Marie v. United States,* 108 F.2d 876 (9th Cir. 1940), *Dawson v. McWilliams,* 146 F.2d 38 (5th Cir. 1944), *Bressler v. Bressler,* 266 F.2d 904 (DC Cir. 1959), Rule 3(a) F.R. App.P., 9 Moore's Fed. Prac. ¶203.12 at 740-742, (4) where there was no showing, nor could there be, of an "intentional relinquishment or abandonment of a known right or privilege," *Fay v. Noia,* 373 US 391 (1963), Rule 3(a) F.R.App.P. by the petitioner who has vigorously and actively prosecuted its action without surcease for the last three years up to the filing of this petition, *MacNeil v. Forte,* 253 F.2d 500 (1st Cir. 1958), *Dickson v. Maryland Casualty Co.,* 102 F.2d 299 (5th Cir. 1939), 9 Moore's Fed. Prac. ¶203.12 at 742, (5) where the summary action by the Court of Appeals is contrary to the history and purpose of Rule 12(c) F.R.App.P. as well as the accepted and usual judicial practice to avoid the harsh penalty of dismissal on the merits for non-compliance with the letter of a non-jurisdictional procedure, 9 Moore's Fed. Prac. ¶211.03 at 1808, ¶212.05 at 1909, and (6) where the Court of Appeals, without stating any reason or rea-

sons for its harsh sanction, granted the motion to dismiss the appeal as to one of the respondents before the time allowed by Rule 12(c) F.R.App.P. to petitioner to respond to the motion, and thereupon treated petitioner's timely filed response as a motion to reconsider the dismissal and denied the "motion."

B. Accepted And Usual Judicial Practice Recognizes The Importance Of Appellate Review On The Merits, And Rule 12 (c) F.R.App.P. Is Applied, In Accordance With Its History And Purpose, Only In Exceptional Cases.

The obligation under Rules 11 and 12 F.R.App.P. to file the record and docket the appeal is not jurisdictional, *Pyramid Motor Freight Corporation v. Ispass,* supra, and the

> "Failure by appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." Rule 3(a) F.R.App.P.

The concern with the timely transmission of the record is

> "*not* with transmission of the record. The parties may agree that the record not be transmitted until appellee's brief has been filed. [Rule 11(d) F.R.App. P., as was done in the case at bar.] Timely transmission is required solely as evidence that the appellant is diligently prosecuting the appeal." 9 Moore's Federal Practice ¶211.03 at 1808 (emphasis added)

For this reason the extension can be granted for "cause shown." Rule 11(d) F.R.App.P.

But even if "cause" is not shown, and even if appellant has but "feeble excuses for delay," *Pyramid Motor Freight Corporation v. Ispass,* 330 US at 704, the courts

"will consider all pertinent factors, such as the substantiality of the question raised by the appeal [*Pyramid Motor Freight Corporation v. Ispass*, supra; *United States v. Wolf and Four Other Cases*, supra; *Airline v. Brown*, 190 F.2d 180 (5th Cir. 1951)], whether appellee has been prejudiced by the appellant's neglect or delay [*Dawson v. McWilliams*, 146 F.2d 38 (5th Cir. 1940); *Bressler v. Bressler*, 266 F.2d 904 (D.C. Cir. 1959)], and the general bona fides of the appellant [*MacNeil v. Forte*, 253 F.2d 500 (1st Cir. 1958), *Dickson v. Maryland Casualty Co.*, 102 F.2d 299 (5th Cir., 1939)]." 9 Moore's Federal Practice ¶203.12 at 742.

Although Rule 12(c) F.R.App.P. literally provides for the dismissal of an appeal for failure of appellant to cause timely transmission or to docket appeal, the purpose of the Rule is to provide the courts with a vehicle to dismiss abandoned appeals, not a device to crush an otherwise meritorious appeal for failure to strictly comply with a non-jurisdictional requirement.

"In view of the fact that many appeals are abandoned, some such device as Rule 12(c) is necessary. *But its presence in the Rules ought not to suggest that the drastic sanction of dismissal is the normal consequence of delay in effecting transmission of the record.* . . . The 'action' that would seem 'appropriate' [under Rule 3(a) F.R.App.P.] when transmission is delayed is an order permitting late transmission and filing coupled with an abridgement of the time within which the appellant must present his brief." 9 Moore's Federal Practice. ¶212.05 at 1909. (emphasis added)

In the case at bar the Court of Appeals issued the blank statement that the respondents' motions to dismiss

the appeal under Rule 12(c) F.R.App.P. were granted. (Appendix "D"). This harsh judgment, without the statement of any reason or reasons for this conclusive penalty, was entered *before* the petitioner's response was timely filed as to one of the respondents under the same Rule 12(c) F.R.App.P. and despite the petitioner's showing of "good cause" for the extension, the substantial question as to the correctness of the judgment below, the lack of any prejudice to the respondents, and the bona fides of the petitioner who in no wise could be said to have abandoned its appeal from the clearly erroneous judgment of the District Court who refused to view the evidence of the amount of petitioner's damages from established antitrust violations in the light most favorable to the petitioner, and who denied the petitioner its right to a jury trial and left petitioner remediless for failure to prove the amount of its damages with certainty, all in disregard of this Court's binding authority to the contrary.

In order for the appeal to have been docketed, it was of course necessary for the record on appeal to have been transmitted to the Court of Appeals. The parties agreed that the District Court could retain the Appellate Papers for use in preparing the appeal. Rule 11(c) F.R.App.P. Therefore all that was necessary was a certificate from the District Court clerk that the designated record on appeal was in his possession.

The single most important part of the Record on Appeal was the trial and post trial transcript. All other parts of the record were on file in the District Court. Neither party had ordered a daily transcript of the trial,

so all that was available was the reporter's stenographic notes.

The petitioner, who had been run out of the business by the respondents, had no money available to pay for the trial transcript. On that basis petitioner filed a motion to proceed in forma pauperis. On the hearing date for the motion, June 12, 1972, nineteen days after the timely filing of the petitioner's Notice of Appeal, the petitioner voluntarily withdrew its motion to proceed in forma pauperis on the advice of local counsel that the law did not permit corporations to proceed on appeal in forma pauperis. The lower court granted 10 days from that date in which the petitioner was to file its cost bond on appeal. Within those ten days the petitioner filed its cost bond and paid the $5.00 filing fee for its Notice of Appeal filed on May 25, 1972.

On the same day that petitioner withdrew its forma pauperis motion, the petitioner thereupon contacted the Court Reporter to order the transcript. The Court Reporter estimated $2600 as prepayment before he would begin to transcribe the trial and post trial transcript.

From that date up to July 25, 1972, petitioner's chief executive officer attempted to raise the estimated $2600. Petitioner's chief executive officer, by July 25, 1972, was able to raise $2400. Petitioner's officer deposited that amount with the Clerk of the District Court.

Petitioner thereupon moved the lower Court to extend the time in which to transmit the record on appeal (the certificate from the clerk that all the appellate papers, including the trial transcript, were on file) to and includ-

ing August 23, 1972, which was 90 days after the filing of the Notice of Appeal.

The lower court denied the motion on the grounds that (1) the deposit of $2400 with the clerk was $200 less than the $2600 prepayment estimate and therefore the transcript had not yet been "ordered"; and (2) the lower court did not believe the "truthfulness" of petitioner's motion to proceed in forma pauperis, which motion was in fact truthful and which motion was withdrawn solely on the advice of counsel that such motions were not available to corporations. There was never a hearing on the motion, so the trial court's reason for denying an extension was an apparent inference drawn from the petitioner's withdrawal of the motion.

The purpose of Rule 12 F.R.App.P. is to insure that appeals will be expedited. There is no showing that petitioner in any way sought to delay its appeal, for that is all it had left after 2½ years of litigation; nor that the petitioner wilfully failed to do what was required to do. Simply stated petitioner through its chief executive officer did everything possible to raise the estimated amount necessary to prepay the Court Stenographer so that the trial and post trial transcripts could be typed and delivered to the Clerk of the District Court for use by the parties in preparing briefs on appeal, and so that the Clerk of the District Court could have certified to the Court of Appeals that the total record on appeal was in the Clerk's possession. When petitioner did deposit with the Clerk the $2400 it had raised, petitioner was advised that the Court Stenographer could not in any event complete the transcript until the last week of September.

Professor Moore notes:

> "Ordinarily, the only reason that the record will not be complete within the 40-day period allowed for its transmission is that the necessary transcript will not be available." 9 Moore's Federal Practice ¶211.10 [1] at 1819.

That was all that was present here.

In *Pyramid Motor Freight Corporation v. Ispass,* 330 U.S. 695 (1947), this Court unanimously held that the United States Court of Appeals for the Second Circuit, speaking at various times through Circuit Judges Augustus N. Hand, Learned Hand, Thomas Swan, Charles Clark, and Jerome Frank, did not err in denying a motion to dismiss an appeal where the appellant had failed to move for an extension of time in which to file the transcript of the record and to docket the appeal until 113 days after the Notice of Appeal, and where the record of the transcript was finally filed and the appeal was finally docketed 156 days after the Notice of Appeal. This was "despite the somewhat feeble excuses for delay." 330 U.S. at 704, quoting the Second Circuit, 152 F.2d 619, 621 (1946). This accords with other decisions which do not apply a simple mechanical application of a non-jurisdictional requirement to a substantial right of a litigant. *Dawson v. Mc Williams,* 146 F.2d 38 (5th Cir. 1944), *St. Marie v. United States,* 108 F.2d 876 (9th Cir. 1940), and *Bressler v. Bressler,* 266 F.2d 904 (D.C. 1959). Contrary decisions where Rule 12(c) F.R.App.P. is applied involve the chronic litigant who nonetheless received extensions of time but abandoned its appeal, *MacNeil v. Forte,* 253 F.2d 500 (1st Cir. 1958); or where an appel-

lant failed to file a brief and failed to appear for oral argument, *Dickson v. Maryland Casualty Co.*, 102 F.2d 299 (5th Cir. 1939).

C. There Exists A Substantial Question As To The Correctness Of The Judgment Below Which Not Only Affects Petitioner But Which Also Endangers The Private Enforcement Of The Antitrust Laws, And Establishes Precedent In Direct Conflict With This Court's Decisions.

The trial court below granted a directed verdict against the petitioner for failure to prove the certainty of the amount of its damages suffered by reason of duly established violations of the antitrust laws. In denying petitioner's motion for a new trial, the trial court below added *nunc pro tunc* as grounds for the directed verdict the failure of petitioner to prove that the respondents' violations of the antitrust laws were either in or affected interstate commerce.

The trial court, which ordered a directed verdict against the petitioner, deprived the petitioner of a trial by jury by weighing the evidence, making factual rulings on the sufficiency of evidence of the amount of petitioner's damages and the affectation of interstate commerce, not viewing the evidence as a whole, not allowing petitioner the benefit of all its evidence, not allowing petitioner the benefit of all inferences and presumptions to be drawn from the evidence, and not resolving all conflicts in the evidence in favor of petitioner in direct conflict with this Court's opinions in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); *Continental Ore*

v. Union Carbide and Carbon Corporation, 370 U.S. 690 (1962); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948); *Eastman Kodak Co. v. Southern Photo Materials,* 273 U.S. 359 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 U.S. 555 (1931); and *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946).

The trial court below did the following: (a) In conflict with this Court's decisions in *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948); found as fact and ruled as a matter of law that the respondents' activities, most of which were *per se* violations of the antitrust laws, neither "substantially affected nor were in interstate commerce" despite the facts (1) that one of the respondents directly threatened the petitioner that if the petitioner went into business in Phoenix the respondent would support high predatory prices in Phoenix against the petitioner from profits derived from respondents' multistate operations, principally those in California and New Mexico, and the facts showed that respondent operated at a loss only in Phoenix making good its threat, (2) that petitioner sold its finished product in California after processing the raw materials in its Phoenix plant, and that for one and a half years after petitioner's plant burned down, petitioner made daily hauls of all of its raw materials to California for processing until petitioner finally went out of business, *Mandeville*

Island Farms, Inc. v. American Crystal Sugar Co., supra, and, cited therein, *Pennsylvania Sugar Refining Co. v. American Sugar*, 166 Fed. 254 (1908); and (3) that one respondent admitted interstate commerce in its Answer.

(b) In conflict with this Court's decisions in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) and *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931), rejected as inadmissible the testimony of the petitioner's chief executive officer regarding "market penetration, profit and price formulae, and damages" despite the facts of petitioner's officer's 17 years experience in the industry outside Phoenix, 6 years experience in Phoenix, service on the Board of Directors of the National Renderers Association for a number of years including service as Chairman of the Cost and Accounting Subcommittee of the Association, service prior to his arrival in Phoenix as chief operating manager of a large rendering company in which he was engaged in the purchase of raw product and the sale of finished product, intimate knowledge of cost and accounting for a rendering operation, daily involvment in purchasing, producing, processing, and selling product, knowledge of practically every facet of yields and value of product, machinery used in operation, customer needs including many innovations in Phoenix by petitioner, success in increasing volume of raw material purchases in the face of respondents' monopolization (despite lost profits suffered because of high predatory prices and unreasonable exclusive dealing contracts with major suppliers entered into, for the first time, after petitioner entered the market), ability to continue in business with

a substantial volume for one and a half years after his plant burned down and despite respondents' concerted refusal to deal and the requirement that respondent himself transported his volume 300 miles per day, and added knowledge gained from all the basic economic facts presented in this case.

(c) In conflict with this Court's decisions in *Eastman Kodak Co. v. Southern Photo Materials Co.*, supra *Story Parchment Co. v. Patterson Parchment Paper Co.*, supra, rejected as inadmissible petitioner's lost investment, loans, debts, and the expenses incurred by petitioner in establishing and running its business in the face of the rankest sort of antitrust violations.

(d) In conflict with this Court's decisions in *Eastman Kodak Co. v. Southern Photo Materials Co.*, supra, *Story Parchment Co. v. Patterson Parchment Paper Co.*, supra, and *Bigelow v. RKO Radio Pictures*, supra, rejected as inadequate economic data from which the jury could make a just and reasonable estimate of the amount of petitioner's damages, even without petitioner's testimony, the following evidence: (1) prices paid by respondents to suppliers before, during, and after petitioner was in the market, including the "market" prices paid to one of respondents' wholly owned subsidiary which, as admitted by respondent, was "captive", and which prices were substantially below the high predatory prices paid "independent" suppliers; (2) prices paid by respondents to suppliers outside Phoenix; (3) prices paid by petitioner to suppliers; (4) respondents' production costs before and during the time petitioner was in the market; (5) petitioner's production costs; (6) respondents' raw material

costs per unit before and during the time petitioner was in the market; (7) respondents' profit and losses before and during the time petitioner was in the market; (8) petitioner's losses; (9) respondents' and petitioner's volume; (10) petitioner's projected volume which took into account respondents' monopolization and petitioner's actual ability to surpass those projections in the monopolized market; (11) respondents' capacity for processing; (12) petitioner's capacity for processing and that petitioner, operating at less than half its capacity, could have handled greater volume; (13) respondents' admission that there existed enough raw material for another competitor; (14) the respondents' and petitioner's books and records; (15) the population growth of the Phoenix market during the relevant period from 150,000 to 750,000 people; (16) the market prices for finished product both in Los Angeles and Phoenix before, during and after petitioner's entry into the market showing increased demand while petitioner was in business; (17) the relationship of respondents' and petitioner's prices to finished prices before, during and after the time petitioner was in the market; (18) the respondents' sales before, during, and after petitioner was in the market; (19) petitioner's sales; (20) respondents' price formulas to be paid suppliers based on finished prices (petitioner's formulas, actually used, were excluded); (21) economic factors involved in the rendering industry relating to production, sales, costs, and profits for different varieties of raw material and finished product; (22) figures used to determine values of rendering businesses, including figures and determinants furnished by respondents; (23) actual purchase prices paid by respondents for former competi-

tors' businesses, including going concern values; (24) respondents' experience, know how, and knowledge in comparison to that of petitioner, including petitioner's steady but costly penetration into the monopolized market; (25) and respondents' threats to petitioner, including respondents' willingness to take losses in Phoenix and subsidize those losses through the multistate parent corporation's deep pocket, and petitioner's damage calculations filed with the court pursuant to court order and made a part of the record. Comparisons with these figures, and without regard to lost investments or actual losses, showed damages of at least $300,000.

(e) In conflict with this Court's decisions in *Beacon* and *Continental,* found as fact and ruled as a matter of law that the respondents' concerted refusal to process petitioner's raw material after petitioner's plant burned down, and the refusal by the renderer in Tucson, Arizona, to process petitioner's raw material after the Tucson renderer told the petitioner that the reason it could not process petitioner's raw material was because respondents threatened Tucson that they would go down to Tucson and compete against Tucson if it dealt with petitioner were the result of the independent exercise of the respondents' and Tucson's business judgment, and not the result of a combination or conspiracy to restrain and monopolize the industry.

(f) In conflict with this Court's decision in *Continental* found as fact and ruled as a matter of law that the post fire activities of the respondents were a separate lawsuit to be considered separately and not as a part of

the whole on the ground that the fire was an intervening cause.

(g) In conflict with this Court's decision in *Eastman, Story, Bigelow* found as fact and ruled as a matter of law that no comparison could be made for purposes of showing what the petitioner would have paid in a free market from the evidence of the raw material price sheets published by one respondents' parent company, which raw material price sheets were widely circulated in Arizona, actually used by one respondent, followed by both respondents, which were abandoned in favor of higher predatory prices when the petitioner entered the market, and which showed the "market" prices to be substantially lower than the prices paid by respondents in Phoenix. The lower court thereupon excluded the price sheets. The price sheets also showed that respondent made good its threat to use the channels of interstate commerce to subsidize high predatory prices in Phoenix with the profits derived from its multistate operations in, among other states, California and New Mexico, by paying "market" prices outside Arizona and high predatory prices in Phoenix during the time the petitioner was in the Phoenix market; but not before or after.

D. Respondents Cannot Show, Nor Did They Attempt To Show, That They Would In Any Way Be Prejudiced By An Extension Of Time To File The Trial Transcript.

The petitioner moved the courts below for an extension of time to file the transcript not to exceed 90 days from the Notice of Appeal or until the trial transcript could be completed. The petitioner fully volunteered to expedite

the filing of its appellate brief as suggested at 9 Moore's Federal Practice ¶211.10[2] at 1823, where it is stated:

> "It would seem that if an extension is sought within a few days or *even weeks after expiration* of the time, it should be granted even where no cause satisfactory to the Court of Appeals is shown. The extension can be granted on the condition that appellant submit his brief at a time earlier than the normal time by the precise number of days of delay in filing. That would cure the mischief of late filing and penalize the party who is at fault." (emphasis added)

or to take any other steps as the courts below may have deemed appropriate as a condition to hearing the appeal on the merits.

Respondents could not be prejudiced nor did respondents claim prejudice, excepting insofar as a hearing on the merits may be prejudicial should the appellate court reverse the judgment of the District Court, and order a new trial.

Since the filing of the record sets the time in which petitioner is to file its appellant brief, Rule 31(a) F.R.App.P., an extension of time does not affect the time in which respondents are to reply, and respondents would have their full time to meet the questions on appeal.

E. The Petitioner Has Not Abandoned His Appeal In Any Wise, Nor Do The Respondents Assert That The Appeal Has Ever Been Abandoned, But Instead Has Actively And Vigorously Prosecuted Its Action And The Extension Was Requested For Grounds Outside The Petitioner's Control.

The petitioner respectfully submits that it shocks the conscience to deprive petitioner of its appeal from a judg-

ment which deprived petitioner of its jury trial solely because petitioner, run out of business by the duly established antitrust violations of the respondents, spent considerable time in raising $2400 for the trial transcript. Certainly the $2400 deposit was an expression of good faith. It simply cannot be the law, as the District Court said it was, that petitioner's failure to raise the entire estimated amount at the time of the motion constituted a failure to "order" the transcript in time. Petitioner did all it could. Besides, the $2600 was an estimate. Further, petitioner was advised that the court stenographer could not, in any event, complete the transcript until the last week of September, one and a half months *after* petitioner filed its motion in the Court of Appeals.

This action was begun in 1969. As the docket entries show (Appendix F), there has been practically no break in the prosecution of that case from the time the complaint was filed up to and including this petition.

In each instance, the petitioner has timely complied with the rules where it was in the power of the petitioner to do so. After timely filing its motion for a new trial, petitioner waited on respondents who failed to file responses to petitioner's motion on time.

Petitioner filed its notice of appeal and motion to proceed in forma pauperis within 30 days of the lower court's denial of petitioner's motion for new trial.

On the same day that petitioner withdrew its motion to proceed in forma pauperis, petitioner immediately contacted the court stenographer to "order" the transcript. The stenographer estimated a prepayment of $2600. The petitioner did not have the money. The petitioner immediately began its search to raise the money.

In 10 days of the withdrawal of the petitioner's motion to proceed in forma pauperis, and pursuant to order of the District Court, the petitioner filed its cost bond on appeal and paid the filing fee on the notice of appeal.

The petitioner designated the record on appeal, and subsequently entered into a stipulation that the District Court would retain the appellate papers pending the filing of briefs in the Court of Appeals.

Petitioner then deposited the $2400 it had been able to raise with the Clerk. The District Court denied the motion.

Petitioner then filed its motion with the Court of Appeals requesting an extension of 90 days from the notice of appeal or until the transcript could be typed in which to file the transcript. On September 14, 1972, the Court of Appeals, *before* the time allowed by petitioner to respond to one of respondents' motions to dismiss, summarily denied petitioner's motion and further dismissed the appeal.

Petitioner moved for a stay to file this petition, which stay was granted.

It is respectfully submitted that absolutely nothing can be shown which in any way suggests petitioner was dilatory or had abandoned its suit.

Petitioner has been and is ready, willing, and able to proceed to an appeal on the merits under any condition or sanction, though petitioner does not believe it has in any way displayed any conduct warranting any condition or sanction to its appeal.

Petitioner's lawsuit is all petitioner has. Savings from a life's work were invested and lost in petitioner's business in Arizona by reason of respondents' blatant antitrust violations. The harsh sentence of the Court of Appeals, without any reason for its decision out of simple fairness to the petitioner, is not warranted, justified, nor, respectfully, acceptable judicial practice, and in effect sanctions the actions by the District Court that denied petitioner his right to trial by jury on the clearly erroneous ground that petitioner had not shown with mathematical certainty the amount of its damages suffered by duly established violations of the antitrust laws.

CONCLUSION

For the reasons and authority cited, petitioner prays that a writ issue permitting petitioner time until the transcript is typed so that petitioner may appeal on the merits; or, in view of the Court of Appeals dismissal, that this Court itself exercise its power and permit a direct appeal to this Court on the merits.

LAW OFFICES OF JOSEPH L. ALIOTO
JOSEPH L. ALIOTO
JOSEPH M. ALIOTO
PETER J. DONNICI
Attorneys for Petitioner

MEADOW, CHECHE & THRASHER
PASQUALE R. CHECHE
Of Counsel

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 72-2468

Bootstrap Trading Co., Inc.,
Plaintiff and Appellant,
vs.
Phoenix Tallow Company, et al.,
Defendants and Appellees.

[September 14, 1972]

ORDER

Before: Duniway and Ely, Circuit Judges

Appellees' motions to dismiss this appeal under Rule 12(c) F.R.App.P. is granted. Appellant's motion for leave to docket appeal out of time is denied. The appeal is dismissed.

/s/ Ben. C. Duniway,
/s/ Walter Ely,
United States Circuit Judges

Appendix B

United States Court of Appeals
For The Ninth Circuit

No. 72-2468

Bootstrap Trading Co., Inc.,
Plaintiff and Appellant,
vs.
Phoenix Tallow Company, et al.,
Defendants and Appellees.

[September 19, 1972]

Before: Duniway and Ely, Circuit Judges

ORDER

Treating plaintiff appellant's opposition to motion of Phoenix Tallow Company to dismiss the appeal as a motion to set aside this court's order of September 14, 1972, dismissing the appeal, the motion is denied.

Appendix C

United States Court of Appeals
For The Ninth Circuit

No. 72-2468

Bootstrap Trading Co., Inc.,
Plaintiff and Appellant,
vs.
Phoenix Tallow Company, et al.,
Defendants and Appellees.

[September 27, 1972]

ORDER

The order and mandate of this Court, entered herein on September 14, 1972, dismissing the appeal in the above captioned case is hereby stayed pending a determination of appellant's request for review by the Supreme Court of the United States.

/s/ Ben. C. Duniway,
Judge
United States Court of Appeals

Appendix D

Minute Entry: Enter further proceedings of jury trial. All counsel present. Arguments on motions now heard. It is ORDERED that Kohn's testimony re market penetration, profit and price formula, and damages is stricken, and defts' motion to strike Kohn's testimony is granted in all respects. It is further ORDERED that defts' motion for a directed verdict is granted and pltf take nothing and defts to recover their costs (defts to recover taxable costs from pltf). At 2:15 P.M. jury return into open Court and are advised of the Court's ruling and that they are discharged from further consideration of this case. Clerk to enter Judgment under the Rule. At 2:30 P.M. ORDER recess.

Appendix E

In the United States District Court
for the District of Arizona

No. Civ. 69-379 Phx. WPC

Bootstrap Trading Company, Inc.,
Plaintiff,

vs.

Phoenix Tallow Company and
Maricopa By-Products Co., Inc.,
Defendant.

[Date May 8, 1972]

Plaintiff has moved for a new trial, extensive memoranda were filed by all parties, and oral argument was had.

In addition to the grounds previously indicated from the bench for granting defendants' motion for directed verdict, the Court notes that defendants had also similarly moved on the basis that the uncontested facts herein show that the particular activities alleged and complained of neither *substantially affected* nor were *in* interstate commerce, which motion was not specifically ruled on. This motion was well taken. *Yellow Cab v. Cab Employers, et al.*, ... F.2d ..... (9th Cir. No. 25,567, March 1, 1972), and cases cited therein.

The motion for new trial is ORDERED denied.

IT IS FURTHER ORDERED that costs will be taxed as heretofore determined by the Clerk following consideration of objections by both sides, which taxation of costs has been reviewed by the Court.

/s/ Wm. P. Copple,
United States District Judge

Mailed this 8th day of May, 1972, to:
Pasquale R. Cheche,
Lewis & Roca,
Jack Corinblit,
Joseph L. Alioto,
Allen McClennen & Fels,
U.S. Attorney, S. Dell Scott.

Appendix F

In the United States District Court
for the District of Arizona

No. Civ. 69-379 Phx. WPC

Bootstrap Trading Company, Inc.,
Plaintiff,

vs.

Phoenix Tallow Company and
Maricopa By-Products Co., Inc.,
Defendant.

MEMORANDUM AND ORDER

Plaintiff has filed herein a "Motion for Extension of Time for Transmission of the Record" on appeal.

The following is a chronology of relevant events:

1. Feb. 1, 1972 Judgment was entered for defendants
2. Feb. 9, 1972 Motion for new trial filed (noticed for Mar. 6, 1972)
   a. Mar. 6—Hearing on motion continued, counsel have to Mar. 10 to file supplemental briefs.
   b. Mar. 13—Motion for New Trial re-set for Mar. 20, 1972.
   c. Mar. 20—Counsel to file stipulation for continuance of oral argument on Motion for New Trial.

d. Mar. 21—Motion for New Trial noticed for April 3, 1972.

e. Apr. 3—Motion for New Trial taken under advisement.

3. May 8, 1972 Motion for New Trial *denied.*
4. May 25, 1972 Notice of Appeal *"Lodged".*
5. May 25, 1972 File Motion to Proceed in Forma Pauperis with affidavit, noticed for June 12, 1972.
6. June 12, 1972 Motion to Proceed in Forma Pauperis withdrawn at hearing.
7. June 20, 1972 Notice of Appeal *filed* upon payment of $5 fee.
8. July 27, 1972 Lodged Motion for Extension of Time to Transmit Record.
9. July 31, 1972 Record due to be transmitted.

Supporting the plaintiff's motion to secure a transcript without payment of cost was only Mr. Kohn's (president of plaintiff corporation) affidavit. Defendants filed objections together with an affidavit and relevant information from Kohn's state court divorce action casting serious doubt upon the truthfulness of Kohn's affidavit as to his assets and inability to pay for a transcript. Mr. Kohn did not contest defendants' allegation and on June 12, 1972, plaintiff summarily withdrew its motion. The Notice of Appeal was filed June 20, 1972. A transcript was not ordered within ten (10) days thereafter. Rule 10(b) Federal Rules of Appellate Procedure.

In plaintiff's application for extension of time lodged on the thirty-seventh day after filing of the Notice of Appeal it is recited that the estimated cost of transcript

is $2600.00 and that arrangements had been made to pay the entire *$2600.00* in order to effectively "order" the transcript. The Clerk's records indicate that on July 26, 1972, Kohn deposited with the Clerk the sum of *$2400.00* to be held for payment of the transcript. The transcript has still not been effectively "ordered".

IT IS ORDERED that the motion for extension of time to file transcript is denied.

Dated August 7, 1972.

/s/ William Copple
United States District Judge

Appendix G

CIVIL DOCKET

United States District Court

Civ-69-379 Phx. WE

Jury demand date: Pltf—10/23/69

Title of Case

Bootstrap Trading Company, Inc.,
an Arizona Corporation, et al,
Plaintiffs,

vs.

Phoenix Tallow Company, an Arizona Corporation; and Maricopa By-Products, Inc., an Arizona Corporation,
Defendants.

Maricopa By-Products, Inc.,
an Arizona corporation,
Counterclaimant,

vs.

Bootstrap Trading Company, Inc.,
an Arizona corporation,
Counterdefendant.

Violation Sherman Clayton Acts—conspiracy and attempt to monopolize—injunction sought and treble damages. (Collecting and rendering of raw material, fat, bones, offal, meat scraps, etc.)

Attorneys
For plaintiff:
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416 Luhrs Bldg.
Phoenix, Arizona 85005
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Joseph M. Alioto
111 Sutter St., Suite 1421
San Francisco, Calif. 94104

For defendant: U. S. Atty.
Lewis & Roca
114 West Adams St.
Phoenix, Arizona 85003
For Maricopa By-Products, Inc.

Allen McClennen & Fels
755 First National Bank Bldg.
Phoenix, Arizona 85004 (252-6131)
and
S. Dell Scott
6565 Sunset Blvd. L.A. Calif. 90028
and
Jack Corinblit
3700 Wilshire Blvd., L.A. Calif. 90005
(all of Phoenix Tallow Company)

STATISTICAL RECORD

J.S. 5 mailed 9/5/69

J.S. 6 mailed 3/5/72

Basis of Action: Fed Ques.

(Date - 1969 (8/26)
Emil Kohn (Rec. 15.00)
8/29) (CD #914) (Disb. - 15.00)

CLOSED

Date	Proceedings
1969	
Aug. 26	1. File Plaintiff's Complaint
Sept. 11	2. File ANSWER of Maricopa By-Products, Inc. and COUNTERCLAIM.
Sept. 11	3. File Deft's First Set of interrogatories.
Sept. 11	4. File Deft's Notice of Taking deposition of Emil Kohn.
Sept. 18	5. File Notice of Appearance of Joseph L. Alioto, Maxwell M. Blecher, Joseph M. Alioto as co-counsel for pltf Bootstrap Trading Co., Inc. in conjunction with the law office of Shuch & Cheche.
Sept. 18	6. File Pltf's Bootstrap etc. Motion for pre-trial Conference and to stay discovery, with proposed Pre-trial Order No. 1 and notice of motion hearing as soon as counsel can be heard.
Sept. 18	7. File Pltf's Motion for leave to file amended complaint, with memo and proposed Amended complaint with jury demand.
Sept. 22	8. File Deft's notice of vacating taking of deposition of Emil Kohn.
Sept. 26	— Issue Summons.
Sept. 26	9. File request for appointment of a private process server and memorandum of appointment.
Sept. 26	10. File notice of motion for pretrial conference and to stay discovery and leave to file amended complaint, set for Monday, October 13, 1969, at 10:00 a.m.
Sept. 29	11. File pltf's reply to defendant Maricopa's counterclaim.
Sept. 29	12. File deft's response to pltf's motions for leave to file amended complaint, for pretrial conference, and to stay discovery.

Date	Proceedings

Sept. 30 — Minute entry: Motion to quash taking deposition of Emil Kohn on for hearing in Civ-69-369; John Flynn, Jack Corinblit, Robert Allen, Paul Ulrich, and John Frank present for deft Maricopa By-Products; Pasquale R. Cheche present for Emil Kohn; and Paul Carrier present for Bashas. Argument now had. It is ordered that oral motion of Mr. Cheche and Mr. Carrier for attorney fees re this matter be continued to 10:00 a.m., October 1, 1969, at which time the Court will rule on this matter.

Oct. 1—Minute entry: Motion to quash taking deposition of Emil Kohn and motion for attorney fees on for hearing in Civ-69-369. John Flynn, Pasquel Cheche, P. Ulrich, John Frank, Paul Carrier, Robert Allen, and Bob Hackett present. It is ordered that the taking of deposition of Emil Kohn continue and that Mr. Kohn answer any questions re documents, location and nature of documents and make efforts to secure same. Request of counsel Cheche and Carrier for attorney fees are denied.

Oct. 1—Minute entry, 1:00 p.m.: Hearing re taking deposition of Emil Kohn and production of documents, in case Civ-69-369: J. Flynn, P. Cheche, P. Ulrich, J. Frank, P. Carrier, R. Allen, Bob Hackett, and Dave Fraser present. It is ordered that Mr. Kohn appear with counsel in the office of J. Flynn with all documents, papers, etc. that pertain to his deposition. It is further ordered that all other depositions scheduled will proceed after the taking of Mr. Kohn's deposition.

Oct. 13—13. File Appearance of Phoenix Tallow Company by Allen McClennen & Fels.

Oct. 13—14. File Application of S. Dell Scott for limited admission with consent of Robert H. Allen; and Enter

DATE PROCEEDINGS

and File Order that S. Dell Scott and Jack Corinblit are hereby admitted to appear in this action.

Oct. 13—15. File Application of Francis O. Scarpullo for limited admission; with consent of Pasquale Checke; and Enter and File Order that said Francis O. Scarpulla is permitted to appear in this action.

Oct. 13—Minute Entry: Pltf's Motions 6 and 7 called for hearing. S. Dell Scott, Jack Corinblit, Paul Ulrich, Pasquale R. Checke and Francis O. Scarpulla present. It is ordered that pltf's motion for pretrial conference and to stay discovery is denied; that pltfs may file their amended complaint and the complaint and action of the pltf Kohn, individually, is thereby dismissed with prejudice; that Emil Kohn will remain a party to this action as counter-defendant. (see minute entry for argument Re subpoenas)

Oct. 13—Minute Entry: It is ordered that motions 6 and 7 were taken under advisement at the 10 a.m. hearing.

Oct. 13—16. Enter and File Order that Pltf's Motion for pretrial conference and to stay discovery is denied; that pltfs may file their amended complaint and the complaint and action of the pltf Kohn, individually, is thereby dismissed with prejudice; that the said Emil Kohn will remain a party to this action as a counter-deft.

Oct. 13—Copies of order mailed to Shuch et al, Alioto and Blecher, Lewis Roca et al, Allen et al, S. Dell Scott and Jack Corinblit.

Oct. 16—17. File Summons with affidavit of private person showing service made upon Phoenix Tallow Company on Sept. 29, 1969 at 9:35 a.m.

DATE PROCEEDINGS

Oct. 23—18. File Summons with affidavit of private process server showing service made upon Phoenix Tallow Company on Sept. 29, 1969.

Oct. 23—19. File Pltf's Amended Complaint, with jury demand.

Oct. 27—File Reporters Transcript of proceedings on consolidate hearings dated Oct. 13, 1969.

Nov. 3—20. File Pltf's Objections to interrogatories.

Nov. 7—21. File Pltf's answers to certain interrogatories propounded by deft Maricopa-By-Products, Inc.

Nov. 10—22. File Pltf's Amended complaint with Jury Demand.

Nov. 10—23. File Deft's Notice of hearing its motion to compel answers to interrogatories on Dec. 1 at 10 a.m.

Nov. 10—24. File Deft. Maricopa By-Products, Inc.'s response to objections to interrogatories and Motion to compel answers.

Nov. 14—25. File Stipulation; and Enter and File Order that pltf and counterclaim deft's objections to interrogatories and deft Maricopa By-Products' response to objections to interrogatories and motion to compel answers shall be argued to the court on Nov. 24, 1969 at 10 a.m. with directions to counsel.

Nov. 17—26. File ANSWER of Maricopa By-Products, Inc. to Amended complaint and Counterclaim.

Nov. 18—27. Enter and File Order setting a pretrial conference on March 9, 1970 at 3 p.m.

Nov. 18—Copies of order mailed to Such et al, Joseph L. Alioto, Lewis Roca et al, Allen et al, S. Dell Scott and Jack Corinblit.

DATE PROCEEDINGS

Nov. 19—28. File Pltf's Motion pursuant to Rule 12(f) of the FRCP, with memo and notice of hearing on Nov. 24, 1969 at 10 a.m.

Nov. 20—29. File Pltf's ANSWER to counterclaim of Maricopa By-Products, Inc.

Nov. 24—30. File response by Deft., Counter-claim pltf. Maricopa By-Products, Inc. to Motion to strike.

Nov. 24—Minute Entry: Pltf's Objections to interrogatories (20) and Deft. Maricopa By-Products, Inc.'s response to objections and motion to compel answers called for hearing. Mr. Scarpulla and P. Cheche present, and P. Ulrich and R. Allen. It is ordered these matters taken under advisement.

Nov. 28—31. Enter and File Order that pltf's objections to interrogatories 5, 6, 7 and 37 are overruled, provided however that the answers need only refer to the period prior to Aug. 26, 1965; that the remaining objections are overruled.

Nov. 28—Copies of order mailed to Shuck et al, Joseph L. Alioto, Lewis et al, Allen et al, S. Dell Scott and Jack Corinblit.

Dec. 2—32. File ANSWER of Phoenix Tallow Company to amended complaint.

Dec. 11—33. File Pltf's answers to interrogatories propounded by deft. Maricopa By-Products.

Dec. 12—34. File Pltf's first set of interrogatories to defts.

Dec. 12—35. File Pltf's Second Set of interrogatories to deft. Maricopa By-Products, Inc.

Dec. 22—36. File Deft's Notice of taking deposition of Emil Kohn.

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Dec. 29—37. File deft. Maricopa By-Products' objections to interrogatories propounded by pltf.

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Feb. 4—38. File Pltf's notice and amended notice of taking deposition of John Haugh.

Mar. 6—39. File Stipulation and Enter and File Order that pretrial set for March 9, be reset for Sept. 14, 1970 at 2 p.m.

Apr. 6—40. File Deft. Maricopa By-Products answers to pltf's second set of interrogatories.

Apr. 16—41. File Deft's notice of hearing motions to compel answers and to strike a portion of the testimony of Emil Kohn on May 4, 1970 at 10 a.m.

Apr. 16—42. File Deft. and Counterclaimant Maricopa By-Products, Inc.'s Motions to compel answers upon oral examination and to strike a portion of the testimony of Emil Kohn on oral examination. (see No. 41 for notice of hearing) with memo.

Apr. 29—43. File Pltf's third set of interrogatories to deft. Maricopa By-Products, Inc.

Apr. 30—44. File Pltf's Memo of Points and Authorities in Opposition to Maricopa's Rule 37(a) Motion.

Apr. 30—45. File Deft's Exparte Motion for acceleration of hearing of objections to interrogatories and Enter and File ORDER that the argument on objections to Bootstrap's third set of interrogatories to deft. Maricopa By-Products, Inc. will be heard at 10 a.m. on May 4, 70; w/objections to Pltf's third set of interrogatories propounded to Deft. Maricopa By-Products, Inc. and Memo.

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May 4—Minute Entry: Pasquale R. Cheche and Francis O. Scarpulla pres. for pltf. S. Dell Scott and Jack Corinblit pres. and John P. Frank and Paul Ulrich also present. It is ordered that Motions of Maricopa By-Products, Inc. (42) are taken under advisement.

May 4—46. Enter and File Order that Motion to compel answers upon oral examination (42) is denied and the motion to strike a portion of the testimony of Emil Kohn is granted; that the objections to interrogatories (45) are sustained and the motion for costs and attorney fees is denied.

May 4—Copies of order mailed to Chuch et al, Lewis Roca et al, Allen McClennen & Fels, S. Dell Scott, Jack Corinblit and Joseph L. Alioto.

May 6—47. File Defts.' proposed Pre-Trial Order.

May 6—48. File Pltf's Motion to terminate deposition of Emil Kohn with memo and notice of hearing on May 6, 1970 at 4 p.m.

May 6—49. File Deft's response to pltf. and counterclaim defts' motion to germinate deposition of Emil Kohn.

May 6—50. File Pltf's notice of taking deposition of John Haugh.

May 12—51. File Stipulation; and Enter and File Protective Order that the record in this case shall be sealed: 2. Counsel for the parties shall not disclose any information whatsoever; 3. no information whatsoever Re this litigation shall be furnished to anyone except by appropriate judicial process; 4. Defts' privilege against self-incrimination with respect to all existing and future grand jury proceedings is in no way waived; 5. Counsel for the parties may use any information developed as a result of discovery dur-

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ing the course of their pretrial preparation or at trial, subject to the Court's rulings as to the admissibility in evidence or use in discovery of any particular item of information.

May 19—52. File Deft., Counterclaim Pltf. Maricopa By-Products, Inc. ANSWERS to Pltf's. Third Set of Interrogatoreis.

May 20—53. File Pltf's. and Counter-defendant's Motion for Entry of Pre-Trial Order No. 1, w/Memo.

May 21—54. File Deft. Maricopa By-Products, Inc.'s Response to Motion for an order impounding documents.

May 21—55. File Deft's. Ex Parte Motion for an order impounding deft. Maricopa By-Products, Inc.'s documents and for further relief with affidavit and proposed order.

May 22—56. File Stipulation; and Enter and File Order Re Maricopa's files, journals and records to be reproduced, and returned.

May 22—57. File Response of Maricopa By-Products, Inc. to Pltf and counter-claim defts motion for entry of pretrial order No. 1.

May 22—Minute Entry: Pasquale R. Cheche pres. for pltf. Paul G. Ulrich and Robert H. Allen present for defts. Motion for an order impounding documents and for further relief argued by respective counsel. Order Counsel to prepare and file stipulation and order. All motions are to be heard on June 8, 1970 at 10 a.m.

Jun 1—58. File Pltf's Notice of Motion for Jun 8, 70, at 10 A.M. w/proposed motion for summary judgment and Memo.

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June 2—59. File Pltf's Third Set of interrogatories to deft Phoenix Tallow Co. and deft Maricopa By-Products, Inc.

June 2—60. File deft Phoenix Tallow Co.'s Motion to suppress evidence, with memo, and notice of hearing on July 20, 1970 at 10 a.m.

Jun 2—60a. File Excerpt of Deposition of Edward N. Basha, Jr.

Jun 2—60b. File Excerpt of Continued Deposition of Emil Kohn (Vol II).

Jun 5—61. File Stipulation that all pending motions will be heard by the Court on July 20, 1970 at 10 a.m. with directions to counsel.

Jun 5—62. Enter and File Order that the motions to be heard on July 20, 1970 as provided in the stipulation will be heard on July 27, 1970 at 10 a.m.

Jun 5—Copies of order mailed to Shuch and Cheche, Lewis Roca et al and Allen et al.

Jun 8—63. File Defendant-Counterclaimant Maricopa By-Products answers to pltf's third set of interrogatories.

Jun 10—64. Enter and File ORDER that oral arguments set for hearing on Jul 27, 70, are hereby vacated; that oral argument will be heard on all motions then pending at 2:30 P.M. on Jul 21, 70.

Jun 10—Copy of Order mailed to Shuch & Cheche, Alioto Blecher & Alioto, Lewis Roca Beauchamp & Linton, McClennen & Fels, S. Dell Scott, and Jack Corinblit.

Jun 23—65. File Pltf's Memo in opposition to Motion to Suppress.

Jun 26—66. File Deft Maricopa By-Products, Inc.'s Response to motion for summary Judgment and motion for submission to deposition, with memo.

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Jul 6—67. File Deft Phoenix Tallow Co.'s Reply to Memo in opposition to Motion to Suppress.

Jul 16—68. File Pltf's Memo in support of Counterdefendant's Motion for Summary Judgment.

Jul 21—Minute order: All pending motions on for hearing. P. Cheche, Maxwell Blecher, Paul Ulrich, Robert Allen, S. Dell Scott, Jack Corinblit, Francis Scarpulla and John P Frank present. Argument not had. It is ordered that motion to suppress evidence obtained by Mr. Kohn is denied; Kohn's Motion for Summary Judgment on counterclaim denied at this time without prejudice; motion for entry of pretrial order #1 is denied; and that pretrial set for 9/14/70 is vacated. Further ordered that by 9/14/70 counsel to report to the Court the status of case at which time a new pretrial date will be set.

Jul 21—69. File application and enter order that Maxwell M Blecher is permitted to appear in this matter as counsel for Bootstrap Trading Co and Emil Kohn.

Aug 5—70. File Transcript of Proceedings of July 21, 1970.

Sept 18—71. File Joint Status Report to the Court.

Sep 29—72. File Pltf's Request for Production of Documents.

Sep 30—73. File Deft and Counterclaim Pltf's Notice of Taking Deposition of Arnold Brown on Oct 7,70; Carl Dorman on Oct 7,70; Lyle Sautter on Oct 8,70; Phil McKirchy on Oct 8,70.

Oct. 23—74. File Deft's, Maricopa By-Products, Notice of Taking Depositions of Kenneth McLeod on Oct. 27, 70; Allen Laney on Oct. 28, 70; Richard Morely on Oct. 28, 70; Gene Florian on Oct. 29, 70; Robert Olden on Oct. 29, 70.

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Oct. 26—75. File Deposition of John H. Haugh.

Oct. 30—76. File Pltf's. Notice of Taking Deposition of Thomas Lewis on Nov. 3, 70; Mr. Giezl on Nov. 4, 70; and Mr. Poer on Nov. 5, 70.

Nov. 2—77. File Deft's., Maricopa By-Products, Inc., Objections to Request for Production of Documents.

Nov. 9—78. File Stipulation and Enter and File ORDER that Deft. Phoenix Tallow Co. shall have to and until Nov. 9, 70, to respond to Pltf's. request to Produce Documents and to permit inspection thereof served Sept. 28, 70.

Nov. 9— Mail cy. of Order to Corinblit and Shapero.

Nov. 12—79. File notice of taking deposition of George Hendrix, Dave Beck, John Ternack, Jake Hendrix, Bob King, Al Soria, Mr. Helbig, and Garfield Anderson.

Nov. 12—80. File Response of Deft. Phoenix Tallow Co. to Pltf's. Request for Production of Documents.

Nov. 16—81. File Amended Notice of Taking Depositions of Philip Peck and Murray Peck.

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Jan. 20—82. File Deft., Maricopa By-Products, Inc.'s., Motion for Order Compelling Discovery, Memo and Notice of Hearing on Mar. 1, 71, at 10:00 A.M.

Jan. 29—83. File Deft's. Motion to Produce and Impound Tape Recordings and Prohibit Further Tape Recordings without express Court Order with Notice of Hearing on March 1, 71 at 10:00 a.m.

Feb. 5—84. File Pltf's. Reply Memo in Opposition to Deft's. Motion to Produce and Impound Tape Recordings and Prohibit Further Tape Recordings without express Ct. Order with Notice of Waiver of Oral Argument.

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Feb. 10—85. File Deft's. Notice of Taking Deposition of John Terhack, Robert King, Chester Robinson, Harold Redding, Henry McNeal, Jr. on Feb. 16, 71; of Glenn Russell, Ron Theriault, G. L. McBath, Richard Swindler, Earl Brenner, on Feb. 17, 71; of Art Taragon, William Pearson, Edward Smith, Michael Holten on Feb. 18, 71.

Feb. 10—86. File Deft's. Request for the appointment of a private process server and memo of appointment of Rita Ben-Shalom.

Feb. 25—87. File Response of U.S.A. to Motion for Order Compelling Discovery and exhibit A & B.

Mar. 1— Minute Entry: Deft. Maricopa By-Products, Inc.'s Motion for Order Compelling discovery (82) and Deft's motion to produce and impound tape recordings and prohibit further tape recordings (83) on for hearing. Present are: John Fels, Michael LaVelle, Gerald Morito, Allen Laney and N. Warner Lee. Order that Mr. LaVelle submit memo as to extent of freedom of information act by Mar. 5, 71, re motion for order compelling discovery and at that time matter will be taken under advisement; that deft's. motion to produce and impound tape recordings, etc., is taken under advisement.

Mar. 3—88. File Memo and Enter and File ORDER that no copies, transcriptions or reproduction of such tape recordings will be made and any that have been made will be forthwith delivered by counsel for Bootstrap and Kohn to the Clerk of this Court for destruction; that Bootstrap and Kohn are prohibited and enjoined from recording, other than by official shorthand reporter, any proceedings in this action except pursuant to a prior order of this Court; that within ten days of the date of this order and at a specific date and

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time to be agreed by counsel, counsel for Bootstrap and Kohn will re-play all of such tape recordings in the presence of counsel for defts. at the office of Phoenix counsel for pltf.; that at the conclusion of such re-play and not later than 10 days from the date hereof, counsel for Bootstrap and Kohn will deliver to the Clerk of this Court all such tape recordings within the possession or control of such parties their agents or counsel, to be sealed and impounded herein pending further order of this Court. Notice of such delivery shall be filed with the Clerk and copy thereof served on counsel for defts. Said notice shall contain an itemization of tapes delivered and shall contain the affidavit or verification of counsel for Bootstrap and Kohn that such delivery is complete and that this order has in all respects been complied with.

Mar. 3— Mail copies of Order to Pasquale R. Cheche, Joseph L. Alioto, Maxwell M. Blecher, Joseph M. Alioto, Lewis & Roca, U. S. Attorney, Allen McClennen & Fels, S. Dell Scott, Jack Corinblit.

Mar. 4—89. File Pltf's. Memo re Motion to Compel Discovery.

Mar. 15—90. File Pltf's. Affidavit with Notice of Delivery to the Clerk of the Court for District of Arizona of Certain Cartridge Tapes.

Mar. 15—90a. File Pltf's. tape recordings.

Apr. 7—91. File Deposition of Ned Lewis.

Apr. 9—92. File Deft.-counterclaim Pltf's. notice of taking deposition of Bud Herseth and Don Lory on Apr. 14, 71; David R. Crockett, George Crockett, Larry Deaktor, Jack Berdt, on Apr. 15, 71; Ray Haggarty, Howard Linsenmeyer, Rbt. Linsenmeyer on Apr. 16, 71.

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May 4—93. File Stipulation and Enter and File ORDER that the motion of Maricopa By-Products, Inc. for an Order compelling discovery is withdrawn.

May 4— Mail copy of Order to Pasquale R. Cheche, Joseph L. Alioto, Lewis & Roca, Allen McClennen, S. Dell Scott, Jack Corinblit.

May 19—94. File Counterclaim Pltf's. Notice of taking deposition of Narbert Schliz and Louis Grienke, and Wayne Hopkins on Jun. 1, 71; Robert Warren, Don Fry, John Hicks, Jack Evans, on Jun. 2, 71; Irving Goldstein, Wm. Goldstein, Alan Barney and Frank Santos on Jun. 3, 71.

June 1—95. File Pltf's. Notice to take Deposition of Milo Taylor, Salvage Coordinator; Produce Division Safeway, on Jun. 8, 71.

June 1— cc of Notice to take deposition issued.

June 22—96. File Stipulation and Enter and File ORDER for Protection of Documents Produced by Safeway Stores in response to Pltf's. subpoena and the information contained therein shall be held in confidence by counsel for pltfs. and defts., for use as may be necessary in course of this case.

June 22— Mail cy. of Stip. & Order of 6/22/71 to Pasquale R. Cheche, Joseph L. Alioto, Lewis & Roca, Allen McClennen & Fells, S. Dell Scott and Jack Corinblit.

July 12—97. File Deposition of David R. Crockett.

July 12—98. File Deposition of Murray Peck.

July 12—99. File Deposition of Phil Peck.

July 12—100. File Deposition of Jake Hendrix.

July 12—101. File Deposition of David Allen Beck.

July 12—102. File Deposition of Robert Poer.

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July 12—103. File Deposition of Tom Lewis.

July 12—104. File Deposition of Norbert J. Schliz.

July 12—105. File Deposition of Wm. Rbt. Warren.

July 12—106. File Deposition of Koran Don Fry.

July 12—107. File Deposition of John Ellwood Hicks.

July 15—108. Enter and File ORDER that this case is set for Jury Trial commencing at 9:30 A.M., Tuesday, Jan. 4, 72; that estimated trial time is 4 weeks; that Pretrial Conference is set for Nov. 22, 71, at 2:00 P.M.

July 15— Mail cy. of Order to Pasquale R. Checke, Blecher & Alioto, U. S. Attorney, Lewis & Roca, Allen et al., S. Dell Scott and J. Corinblit.

July 20—109. File Deposition of Wayne A. Hopkins.

July 20—110. File Deposition of Don Lory.

July 20—111. File Deposition of Jack Berdt.

July 20—112. File Deposition of Howard Linsenmeyer.

July 20—113. File Deposition of Wm. J. Gieszl.

July 22—114. File Continued Deposition of George Hendrix, Jr., Vol II.

July 22—115. File Deposition of Jack J. Evans.

July 22—116. File Deposition of Wm. Goldstein.

July 22—117. File Deposition of Alan G. Barney.

July 22—118. File Deposition of Rbt. L. Olsen.

July 22—119. File Deposition of Eugene E. Florian.

July 22—120. File Deposition of George Hendrix, Jr. Vol I.

July 22—121. File Deposition of Kenneth L. McLoed.

July 22—122. File Deposition of Louis A. Greinke.

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July 29—123. File Deposition of Lyle A. Sautter.

July 29—124. File Deposition of Allen F. Laney.

July 29—125. File Deposition of Bud Herseth.

July 29—126. File Deposition of Philip J. McKirchy.

Aug. 17—127. File Deposition of Ray Hagerty, Apr 15, 71.

Aug. 17—128. File Deposition of Larry Deaktor, of Apr 15, 71.

Aug. 17—129. File Deposition of Frank Santos, of Jun 3, 71.

Sept. 23—130. File Deposition of Milo H. Taylor.

Sept. 23—130a. File Exhibits to Deposition of Milo H. Taylor.

Nov. 8—131. File Stipulation and Enter and File ORDER that the date for lodging the stipulated form of proposed pretrial order pursuant to local rule 42 and date for filing trial memo are continued one week to Nov 15, 71.

Nov. 8— Mail cy of stipulation and Order to Pasquale R. Cheche, Joseph L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott, and Jack Corinblit.

Nov. 19—132. File Stipulation and Enter and File ORDER that the pretrial conference scheduled for Nov 22, 71, is continued to Dec 6, 71, at 2:00 P.M.

Nov. 19— Mail cy of Stipulation and Order to Pasquale R. Cheche, J. L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott, and Jack Corinblit.

Nov. 30—133. File Deft Phoenix Tallow Co.'s Pretrial Memo.

Nov. 29—134. File Pretrial Memo of Deft Maricopa By-Products, Inc.

Nov. 29—Lodge Proposed Pretrial Order of Deft-Pltf.

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Dec. 3—135. File Deposition of J. Carl Dornan, Vol I.

Dec. 3—136. File Deposition of Arnold H. Brown Vol I.

Dec. 3—137. File Deposition of Emil Kohn, Vol I, Mar 25, 70.

Dec. 3—137a. File Deposition of Emil Kohn, Vol II, Mar 27, 70.

Dec. 3—137b. File Deposition of Emil Kohn, Vol III, May 4, 70.

Dec. 3—137c. File Deposition of Emil Kohn, Vol IV, May 5, 70.

Dec. 3—137d. File Deposition of Emil Kohn, Vol V, May 6, 70.

Dec. 3—137e. File Deposition of Emil Kohn, Vol VI, May 7, 70.

Dec. 3—137f. File Deposition of Emil Kohn, Vol VII, May 8, 70.

Dec. 3—138. File Pltf's Trial Brief.

Dec. 6— Lodge Supplemental Proposed Pretrial Order.

Dec. 7—139. File Memo that a PRETRIAL CONFERENCE being held Dec 6, 71, present were: Joseph M. Alioto, Pasquale R. Cheche, Emil Kohn, Jack Corinblit, S. Dell Scott and John P. Frank; it is ORDERED that this case is set for Trial commencing at 9:30 A.M. on Thursday, Jan 13, 72.

Dec. 7— Mail cy of Memo and Order to Pasquale R. Cheche, Joseph L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott and Jack Corinblit.

Dec. 8— Minute Entry: Order that the Trial scheduled for January 4, 72, is hereby vacated and reset for JURY TRIAL on January 13, 1972, at 9:30 A.M. in Ctroom No. 3.

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Dec. 8— Mail cy of Minute Entry to Pasquale R. Cheche, J. L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott and Jack Corinblit.

Dec. 15—140. File Pltfs' List of Additional Exhibits and Witnesses.

Dec. 17—141. File Stipulation and Enter and File ORDER that the time for defts to file & list any additional witnesses or exhibits to Dec 20, 71.

Dec. 17—142. File Pltfs' Designation of Exhibits Relating to Summary Charts.

Dec. 17—143. File Pltfs' Addendum to Pltfs' List of additional exhibits and witnesses.

Dec. 17— File Pltfs' Exhibits #101 thru 410.

Dec. 20—144. File Defts' Supplemental Designation of Witnesses and Exhibits.

Dec. 20—145. File Deft Phoenix Tallow Co. and Maricopa By-Products, Inc.'s Supplemental Designation of Witnesses and Exhibits.

Dec. 20—146. File Pltfs' Addendum to Pltfs' List of Additional Exhibits and Witnesses and attachments, 412. Bootstrap Records relative to supermarket prices Aug 1965-Dec 1968.

Dec. 22—147. File Affidavit of Service of Defts Phoenix Tallow Co. Maricopa By-Products, Inc.

Dec. 27—148. File Stipulation and Enter and File ORDER that Pltfs' time to file their brief of fact and law on the issue of remoteness is extended; extending time for pltfs to file their detailed statement of damages to be claimed and asserted at trial and the means of their determination; extending time for Pltfs and Defts to exchange and submit to the court their proposed jury instructions; and that documents and things shall be filed not later than Dec 27, 71.

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Dec. 27— Mail cy of stipulation and Order to Pasquale R. Cheche, J. L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott, and Jack Corinblit.

Dec. 28—149. File Pltfs' Proposed form of Cautionary Instruction.

Dec. 28—150. File Pltf's Memo that Acts by the Defts and others in 1946, 1947 and 1953 are not so remote as to be excluded.

Dec. 28—151. File Pltf's Memo of Applicable Law.

Dec. 28—152. File Pltf's Damage Calculations.

Dec. 28—153. File Pltf's proposed Jury Instructions.

Dec. 28—154. File Pltf's proposed form of judgment.

Dec. 28—155. File Defts' Requested Jury Instructions.

Dec. 28—156. Pltf's Proposed Verdict.

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Jan. 4—157. File Stipulation and Enter and File ORDER that the time for filing defts' response to pltf's memo concerning remoteness in time as to certain of pltf's proposed evidence may be extended from Dec 31, 71, to and including Jan 5, 72; that the time for filing pltf's reply to that response may be extended from Jan 7, 72, to and including Jan 11, 72.

Jan. 4— Mail cy of stipulation and order to Pasquale R Cheche, Joseph L. Alioto, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott, and Jack Corinblit.

Jan. 5—158. File Pltf's Objections to Defts' Exhibits and Summary Charts.

Jan. 5—159. File Deft Maricopa By-Products, Inc.'s Memorandum that Pltf's Exhibits No. 1 through 10 and the Subject Matters thereof are not Admissible as Evidence.

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Jan. 5—160. File Joint Position of Defendants on Pltf's Exhibits.

Jan. 7—161. File Pltf's Motion to Shorten Period to Answer Interrogatories, Memo, Notice, and Enter and File ORDER that Pltfs Motion to Shorten Period to Answer Interrogatories will be heard on Monday, Jan 10, 72, at 2:00 P.M.

Jan. 7— File Deft's Exhibits 5, 6, 7, and 8 to Florian Deposition.

Jan. 10—162. File Deft Phoenix Tallow's Answering Brief re Admissibiilty of 1946-1953 evidence.

Jan. 10— Minute Entry: Pltf's motion to shorten period to answer interrogatories on for hearing. Pasquale Cheche, J. Alioto, John Frank, Paul Ulrich, S. Dell Scott, Jack Corinblit present. Counsel having orally agreed on interrogatories, Motion is now moot.

Jan. 11—163. File Plaintiff's answers to questions propounded by Defendants in support of plaintiff's charts 1 through 6.

Jan. 12—164. File pltf's proposed questions on voir dire.

Jan. 12—165. File pltf's withdrawal of objections to certain of defts' exhibits.

Jan. 12—166. File defts' list of exhibits reserved for impeachment and not offered in evidence.

Jan. 12—167. File Defts' Requested Voir Dire Questions to the Jury Panel.

Jan. 13— Minute entry: On for jury trial. Present are P. Cheche, J. Alioto, R. Allen, S. Dell Scott, J. Corinblit, J. Frank and P. Ulrich. A jury of 6 persons plus 4 alternates is duly empaneled and sworn to try this case. Jury excused at 11:15 a.m. until 1:30 p.m. for lunch. In absence of the jury, Court states to

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counsel that the stipulated form of pre-trial order is approved as the Order of the Court, except as supplemental changes made by the Court since the filing of the pre-trial order. It is ordered that counsel, by 1/20/72, exchange and file with the Court written objections as to instructions. Sub., at 1:30 p.m. jurors, all counsel being present, proceedings of trial are had. Counsel for pltf. presents opening statement to the jury and counsel for each deft. presents opening statement to the jury. At 4:00 p.m. order recess until 9:30 a.m. on 1/14/72. Jury admonished.

Jan. 13—168. File jury list.

Jan. 14— Minute Entry: Enter further proceedings of jury trial. Jury and all counsel present. At 4:40 PM ORDER recess until Tues., Jan 18, 1972.

Jan. 18— Minute Entry: Enter further proceedings of Jury Trial. All counsel and jury present. Order that the protective Order in CIV 69-369 be released as to the depositions. At 4:40 P.M., Order recess until 10:00 A.M., Jan 19, 72.

Jan. 20—169. File Request for appointment of private process server and Memo of appointment of G. K. Spencer, et al.

Jan. 20— Minute Entry: Enter further proceedings of Jury Trial of Jan 19, 72. Jury and all counsel present. at 4:35 P.M., order recess until 1/20/72 at 9:30 A.M.

Jan. 20— Minute Entry: Enter further proceedings of Jury Trial. Jury and all counsel present. at 4:35 P.M., order recess until 1/21/72, at 9:30 A.M.

Jan. 21— Minute Entry: Enter further proceedings of jury trial. Jury and all counsel present. At 4:00 PM order recess until 9:30 AM on Tuesday, Jan 25, 1972.

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Jan. 24—170. File Deft Maricopa By-Products, Inc.'s Memorandum of Applicable Law.

Jan. 24—171. File Deft Maricopa By-Products, Inc.'s supplement to Memorandum of Applicable Law.

Jan. 26—172. File Defts' Objections to Pltf's Jury Instructions.

Jan. 26—173. File Deft Maricopa By-Products, Inc. Motion for Directed Verdict and Memo.

Jan. 26— Minute Entry: Enter further proceedings of Jury Trial of Jan 25, 72. Counsel and Jury present. At 4:25 P.M. order recess until 9:30 A.M., Jan 26, 72.

Jan. 26—174. Docket Pltf's Memo on Interstate Commerce filed Jan 25, 72.

Jan. 27—175. File Pltf's Memorandum on the Admissibility of Evidence to Prove the Amount of the Pltf's Damage.

Jan. 26—Minute Entry: Enter further proceedings of Jury Trial. Jury and all counsel present. Order that counsel for pltf. file memo by 9:00 A.M. on 1/27/72 and counsel for deft. by 11:00 A.M. respond. Order recess until 1:00 P.M. on Jan. 27, 72. Jury admonished.

Jan. 27—176. File Deft. Phoenix Tallow Co.'s Memo re admissibility of evidence of loss of capital value and admissibility of Baker Commodities, Inc. price sheets.

Jan. 27—Minute Entry: Enter further proceedings of Jury Trial. Jury and counsel present. At 4:30 P.M., Order recess until 9:30 A.M. on Jan. 28, 72. Jury Admonished.

Jan. 28—Minute Entry: Enter further proceedings of jury trial. Jury and all counsel present. Plaintiff rests.

DATE PROCEEDINGS

All motions made by the defts. to strike are now renewed. In re defts.' motion for a directed verdict, any additional memo to be filed by noon by defts. on Jan. 31, 1972 and plts. to respond by 4:00 P.M. on Jan. 31, 1972, and arguments will be heard at 10 A.M. on Feb. 1, 1972. ORDER jury excused and admonished until 1:30 P.M. on Feb. 1, 1972.

Jan. 31—177. Deft. Maricopa By-Products, Inc. Motions to Strike and for Directed Verdict and Memo.

Jan. 31—178. File Deft. Phoenix Tallow Co.'s Special Memo in support of Motion to Strike and Motion for Directed Verdict, Including comparative content analysis of the Kohn Testimony.

Jan. 31—179. File Motion for Directed Verdict by Deft. Phoenix Tallow Co.

Jan. 31—180. File Deft. Phoenix Tallow Co.'s Motion to Strike Damage Exhibits and Testimony of Emil Kohn Relating to Damages.

Jan. 31—181. File Joint Reply Memorandum of Phoenix Tallow Co. and Maricopa By-Products re Issue of Interstate Commerce.

Feb. 1—182. File Pltf.'s Memorandum in Opposition to Motions for Directed Verdict and to Strike.

Feb. 1—183. File Maricopa By-Products, Inc.'s Reply to Pltf.'s Motion in Opposition to Motions for Directed Verdict and to Strike.

Feb. 1—184. File proposed pretrial order.

Feb. 1—185. File Transcript of proceedings of July 21, 70.

Feb. 1— Lodge, as of 12/28/71, Defts' Proposed Cautionary Instruction.

Feb. 1—186. File Pltf's Objection to Defts' Instructions.

DATE	PROCEEDINGS

Feb. 1— Minute Entry: Enter further proceedings of jury trial. All counsel present. Arguments on motions now heard. It is ORDERED that Kohn's testimony re market penetration, profit and price formula, and damages is stricken, and deft's motion to strike Kohn's testimony is granted in all respects. It is further ORDERED that defts' motion for a directed verdict is granted and pltf. take nothing and defts. to recover their costs (defts to recover taxable costs from pltf.). At 2:15 P.M. jury return into open Court and are advised of the Court's ruling and that they are discharged from further consideration of this case. Clerk to enter Judgment under the Rule. At 2:30 P.M. ORDER recess.

Feb. 1—187. Enter and File JUDGMENT that the plaintiff take nothing, that the action is dismissed on the merits, and that the defendants recover of the plaintiff their taxable costs of action.

Feb. 2— Mail copies of judgment to Pasquale R. Cheche, Joseph M. Alioto, Lewis & Roca, Allen McClennen & Fels, Dell Scott, and Jack Corinblit.

Feb. 3—188. File Transcript of Trial Proceedings, Vol. I thru VII.

Feb. 3—189. File Transcript of Trial Proceedings (Transcript of Plaintiff's Opening Statement) January 13, 1972.

Feb. 3—190. File Transcript of Trial Proceedings, Transcript of Certain Rules of the Court outside the Presence of the Jury, Jan. 27, 1972.

Feb. 3—191. File Transcript of Trial Proceedings, Transcript of Comments of the Court upon Granting Motion for Directed Verdict, Feb. 1, 1972.

DATE PROCEEDINGS

Feb. 9—192. File Pltf's Motion Pursuant to Rule 59 of the Federal Rules of Civil Procedure to Vacate Judgment and Grant a New Trial, Memorandum, and Notice of Motion to be heard Monday, Mar. 6, 1972 at 10:00 A.M.

Feb. 11—193. File Deft Maricopa By-Products, Inc.'s Bill of Costs in the amount of $15,075.74.

Feb. 11—194. File Deft Phoenix Tallow Co.'s Bill of Costs in the amount of $13,156.28.

Feb. 15—195. File Plaintiff's Objections to Deft Phoenix Tallow's Bill of Cost.

Feb. 15—196. File Pltf's Objections to Deft Maricopa's Bill of Costs.

Feb. 25—197. File Pltf's Memorandum in Support of Its Objections to Defts' Bills of Cost.

Feb. 25—198. File cc of Transcript of Trial Proceedings of Feb. 1, 72.

Feb. 25—199. File Defendants' Joint Memorandum in Support of Taxation of Costs.

Feb. 28—200. File Response of Deft Maricopa By-Products, Inc., to Bootstrap's Motion for New Trial.

Feb. 29—201. File Defts' Joint Memo in Response to Pltf's Memo objecting to Bills of Costs.

Mar. 1—202. File Clerk's Memo and Taxation of Deft. Phoenix Tallow Company's Costs in amount of $6,303.18, and Deft. Maricopa By-Products' Costs in amount of $8,196.11.

Mar. 1— Mail cy of Memo and Taxation of Costs to Pasquale R Cheche, Joseph L. Alioto, Lewis & Roca, Allen et al., and Jack Corinblit.

Mar. 1— Enter costs in J.D.

DATE PROCEEDINGS

Mar. 2—203. File Deft Phoenix Tallow's Memorandum in Opposition to Pltf's Motion for a New Trial.

Mar. 2—204. File Pltf's Motion to Strike and Notice of Hearing on Mar. 6, 72, at 10:00 A.M.

Mar. 3—205. File Deft Maricopa By-Products' Response to Plaintiff's Motion to Strike.

Mar. 6—206. File Phoenix Tallow's Response of Deft Phoenix Tallow Company to Pltf's Motion to Strike.

Mar. 6— Minute Entry: Pltf's motion to vacate judgment and grant a new trial (192); and Pltf's. motion to strike (204) on for hearing. Joseph Alioto and Pasquale Cheche pres for Pltf. John Frank & Paul Ulrich pres for deft. Maricopa By-Products. S. Dell Scott and Jack Corinblit pres for deft. Phoenix Tallow. Order that counsel allowed until Mar. 10, 72, to file additional final briefs and to notice same for oral argument any Monday thereafter; that motions on for hearing today taken under advisement.

Mar. 13—207. File Pltf's Notice of Motion for a New Trial and Request for Oral Argument set for hearing on Monday, March 20, 1972 at 10 A.M.

Mar. 20— Minute Entry: Plaintiff's Motion for New Trial on for hearing. Pasquale Cheche, Paul Ulrich, B. Allen, S. Dell Scott and Jack Corinblit present. It is ORDERED that counsel mail in an agreed stipulation on a date to continue this hearing.

Mar. 21—208. File Stipulation and Enter and File ORDER that the time for oral argument of pltf's motion for a new trial is continued to Apr. 3, 72, at 10:00 A.M.

Mar. 21— Mail cy of stip and order to Pasquale R. Cheche, Alioto et al, U. S. Atty., Lewis & Roca, Allen et al, S. Dell Scott, and Jack Corinblit.

Date	Proceedings
Apr. 3—	Minute Entry: Hearing had on pltf's motion for a new trial. J. Alioto present for pltf., Jack Corinblit and S. Dell Scott present for deft. Phoenix Tallow, and Paul Ulrich present for deft. Maricopa By-Products. ORDER matter taken under advisement.
May 8—209.	Enter and File ORDER that Pltf's Motion for New Trial is DENIED; that costs will be taxed as heretofore determined by the Clerk following consideration of objections by both sides, which taxation of costs has been reviewed by the Court.
May 8—	Mail cy of Order to Pasquale R. Cheche, Lewis & Roca, Jack Corinblit, Joseph L. Alioto, Allen et al, U. S. Attorney, and to S. Dell Scott.
May 8—209.	Enter and File ORDER that Pltf's Motion for New Trial is DENIED; that costs will be taxed as heretofore determined by the Clerk following consideration of objections by both sides, which taxation of costs has been reviewed by the Court.
May 8—	Mail cy of Order to Pasquale R. Cheche, Lewis & Roca, Jack Corinblit, Joseph L. Alioto, Allen et al, U. S. Attorney, and to S. Dell Scott.
May 25—	Lodge Pltf's Notice of Appeal.
May 25—210.	File Pltf's Motion for Leave to Appeal in Forma Pauperis and Notice of Hearing on Monday, June 12, 1972, at 10 A.M.
May 25—	Lodge Affidavit in Support of Motion for Leave to Appeal In Forma Pauperis and proposed order.
June 7—211.	File Response of Deft. Maricopa By-Prodcuts, Inc., to Pltf's Motion for Leave to Appeal in Forma Pauperis.

DATE PROCEEDINGS

June 9—212. File Deft's Objections to pltf's motion for leave to appeal in forma pauperis and response.

June 12— Minute Entry: Hearing had on pltf's Motion for Leave to Appeal in Forma Pauperis. Pasquale R. Cheche present for pltf, Paul Ulrich present for deft Phoenix Tallow. Pltf's Motion for Leave to Appeal in Forma Pauperis is withdrawn. Pltf allowed 10 days to file appeal bond.

June 20—213. File Pltf's notice of appeal ($5.00 fee paid) Copy to Crt Reporter.

June 20—214. File Pltf's cost bond on appeal.

June 26—215. File Pltf's designation of record. Copy of designation mailed to Lewis & Roca, Pasquale Cheche, Allen McClennen, S. Dell Scott and Jack Corinblit Court Reporter.

July 17—216. File Pltf's designation of record on appeal. Copy to Crt Reporter.

July 31—217. File Pltf's Motion for Extension of Time for Transmission of the Record.

Aug. 7—218. File Memo and Enter and File ORDER that the Motion for Extension of Time to file Transcript is DENIED.

Aug. 7— Mail cy of Memo and Order to: Pasquale R. Cheche, Alioto et al, U. S. Attorney, Lewis & Roca, Allen et al, S. Dell Scott and to Jack Corinblit.

Aug. 7—219. File Stipulation that the Clerk temporarily retain the record for use by the parties in preparing their appellate brief. File and Enter Order it is so ordered.

Date	Proceedings
Aug. 15—	Preliminary record transmitted to 9th CCA. Copy of transmittal letter with copy of Clerk's Certificate sent to: J. Alioto, Cheche, Lewis & Roca, Allen McClennen & Fels, Gillin & Scott and Corinblit.
Aug. 17—220.	File deft's petition for an order of the Clerk that Pltf's bond for costs on appeal is insufficient.
Aug. 17—221.	Enter and file Clerk's Memorandum and determination that pltf's cost bond on appeal is defective as to form.
Aug. 17—	Mail copy of Clerk's Memorandum to Pasquale R. Cheche, Joseph L. Alioto, Lewis Roca, Allen McClennen, S. Dell Scott, and Jack Corinblit.

Appendix H

FEDERAL RULES OF APPELLATE PROCEDURE

JUDGMENTS OF DISTRICT COURTS

Rule 11.

TRANSMISSION OF THE RECORD

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must

make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause

shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed of fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(c) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the dis-

trict court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties that Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

Rule 12.

DOCKETING THE APPEAL; FILING OF THE RECORD

(a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at

the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing of the Record. Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11(c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.

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JAN 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-869

BOOTSTRAP TRADING CO., INC.,
Petitioner,

vs.

PHOENIX TALLOW COMPANY and
MARICOPA BY-PRODUCTS, INC.,
Respondents.

MEMORANDUM OF RESPONDENT MARICOPA BY-PRODUCTS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MEMORANDUM OF RESPONDENT MARICOPA BY-PRODUCTS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Maricopa By-Products, Inc. prays that the petition for a writ of certiorari in this case be denied.

OPINIONS BELOW

The opinions and orders of the Arizona District Court and the Court of Appeals for the Ninth Circuit are unpublished. They are correctly set forth in the Appendices to the petition.

JURISDICTION

This is a private antitrust action of which the district court had jurisdiction under 15 U.S.C. § 15. The court of appeals entered judgment on September 14, 1972, and denied rehearing on September 19, 1972. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE PETITION

In this private antitrust suit a directed verdict was entered at the end of plaintiff's (Bootstrap's) case. The notice of appeal may not have been timely filed (Pet. App. 7-8), in view of Bootstrap's withdrawal of its motion for leave to proceed in *forma pauperis* when the truthfulness of its president's supporting affidavit was challenged (Pet. App. 8). Regardless of whether the notice was timely "filed" when it was first "lodged" with the district court, however, all of the succeeding steps required to process the appeal were taken far too late.*

The record was clearly not transmitted to the court of appeals and the appeal was not docketed within the time required by Fed. R. App. P. 12. A motion to extend the time for transmitting the record was filed in the district court at the last moment. The district court, after full consideration, denied that motion (Pet. App. 7-9). The court of appeals thereafter denied Bootstrap's motion for leave to docket the appeal out of time and dismissed it pursuant to Fed. R. App. P. 12(c) (Pet. App. 1).

There is not the faintest suggestion of any conflict of decision in the interpretation of the rules of appellate procedure involved or of any general importance of the procedural questions sought

*The trial transcript was not ordered within 10 days after the notice of appeal was actually filed as required by Fed. R. App. P. 10(b) (Pet. App. 8). Bootstrap never did pay the deposit required by the court reporter to prepare the trial transcript. The cost bond on appeal was found to be defective as to the form required by Fed. R. App. P. 7 and therefore void (Pet. App. 40). Bootstrap failed to timely file a designation of record on appeal as required by District of Arizona Local Rule 9 (Pet. App. 39).

to be raised. The only issue presented concerns whether the district court and the court of appeals properly exercised the discretion given by those rules based on the particular facts presented. The district court obviously found that the record cast "serious doubt upon the truthfulness" of petitioner's president and the reliability of his protestations (Pet. App. 8-9). Nothing in the petition controverts those findings. There is nothing here but an unappetizing tangle of facts unworthy of review. *See, e.g., United States v. Johnston,* 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925); *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672 (1949); *Berenyi v. District Director,* 385 U.S. 630, 635, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,
LEWIS AND ROCA
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Attorneys for Respondent
Maricopa By-Products, Inc.

January, 1973

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-869

BOOTSTRAP TRADING CO., INC.,

Petitioner,

vs.

PHOENIX TALLOW COMPANY and MARICOPA BY-PRODUCTS, INC.,

Respondents.

Brief of Respondent Phoenix Tallow Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The decision of the court below to dismiss Bootstrap's appeal was clearly within its discretionary jurisdiction under Rule 12(c) of the Federal Rules of Appellate Procedure. Thus, no basis for review by this court has been shown.

Opinions Below.

The opinions and orders of the Arizona District Court and the Court of Appeals for the Ninth Circuit are unpublished. They are correctly set forth in the Appendices to the Petition.

Statement.

The relevant facts, which are stated in part in the opinion of the Arizona District Court (App. pp. 7-9)

and in the petition (Pet. pp. 8-16) may be briefly summarized.

After a judgment upon a directed verdict was entered against Petitioner, Bootstrap Trading Co., Inc., an Arizona corporation (Bootstrap) on February 1, 1972, in its suit for damages under the antitrust laws against respondents Phoenix Tallow Company (Phoenix Tallow) and Maricopa By-Products, Inc. (Maricopa), and Bootstrap's motion for a new trial was denied on May 8, 1972, Bootstrap commenced its appellate proceedings in a highly unusual manner. It did not file a notice of appeal under 28 U.S.C. §2107 with a $5.00 filing fee pursuant to 28 U.S.C.A. 1917, but, instead, on May 25, 1972, Bootstrap "lodged" a notice of appeal and simultaneously filed a motion for leave to appeal *in forma pauperis.*

Bootstrap is an Arizona corporation and its moving papers contained no case law or statutory authority holding that a corporation has the right to appeal *in forma pauperis.* Bootstrap's motion contained only a single affidavit of its majority stockholder and principal officer, Emil Kohn (Kohn) purporting to allege facts showing his inability to pay the cost of the appeal. The corporation had at least two stockholders with substantial assets, and many creditors who each had a substantial financial stake in the success of Bootstrap's appeal. No other officer, director, stockholder or creditor filed any affidavit as to financial inability to finance the appeal.

Phoenix Tallow and Maricopa opposed Bootstrap's motion for leave to appeal *in forma pauperis* and in this connection copies of earlier affidavits by Kohn were filed which uncovered the fact that Kohn had receipts

and earnings which he had not disclosed, and that he had property whose value he had understated.[1]

On June 12, 1972, the date set for the hearing of Bootstrap's motion for leave to appeal *in forma pauperis*, Bootstrap withdrew the motion. (Pet. p. 10.)

As of the date the motion was withdrawn, thirty-four days had already elapsed after the entry of the order denying a new trial on May 8, 1972. Eight days later, on June 20, 1972, Bootstrap paid the $5.00 filing fee and its earlier "lodged" notice of appeal was filed. (Pet. App. G, p. 39.)[2]

Rule 10(b) of the Federal Rules of Appellate Procedure (App. A, p. 2) required that, within ten days after filing a notice of appeal, Bootstrap order a transcript of such parts of the proceedings not already on file which Bootstrap deemed necessary for inclusion in the record. It also required that Bootstrap make satisfactory arrangements with the reporter for payment of the costs at the time the transcript was ordered.

---

[1]See Motion to Appeal *in forma pauperis* filed 5/25/72; Response of Defendant Maricopa to Plaintiff's Motion for Leave to Appeal *in forma pauperis*, dated 6/6/72; Motion of Phoenix Tallow to Dismiss Appeal, dated 8/31/72.

[2]It is arguable that this "filing" on June 20, 1972, forty-two days after the denial of the motion for a new trial, was out of time under the thirty day jurisdictional requirement of 28 U.S.C.A. §2107, although neither the District Court or the Court of Appeals so held. Bootstrap argues (Pet. pp. 9-10) that it is saved from this result because it timely "lodged" a notice of appeal on May 25, 1972, although without the $5.00 fee, (*Parissi v. Telechron*, 349 U.S. 46 (1955) and on the same date filed its motion for leave to appeal *in forma pauperis* (*Tesciona v. United States*, 206 F.2d 479 (D.C. 1953). Since Bootstrap concedes that it intentionally failed to file the $5.00 fee (Pet. p. 9) and *Parissi* involved an inadvertent failure to pay the filing fee, *Parissi* may not be applicable. Moreover, Bootstrap's withdrawal of its motion to appeal *in forma pauperis*, after the credibility of Kohn's affidavit was attacked, might vitiate the status of that motion which, where it is bona fide, is customarily treated as the equivalent of a notice of appeal.

Rule 11(a) of the Federal Rules of Appellate Procedure (App. A, p. 4) emphasized this requirement by providing that after filing the notice of appeal "the appellant shall comply with the provisions of Rule 10(b). . . ." Bootstrap did not order the reporter's transcript and did not make arrangements to pay for the transcript at any time. (Pet. App. F, p. 8.)[3]

Rule 11(a) of the Federal Rules of Appellate Procedure (App. A, p. 4) required that the entire record, including the reporter's transcript and the clerk's transcript, be transmitted to the Court of Appeals within forty days after the filing of the notice of appeal. The record was not transmitted by Bootstrap within the forty days, or at any time.[4]

Rule 12(a) of the Federal Rules of Appellate Procedure required Bootstrap to docket its appeal in the Court of Appeals initially within the same forty day period allowed for the transmission of the record. (App. A, pp. 7-8.) Docketing an appeal involves the payment of a filing fee only. Bootstrap did not docket the appeal within the forty day period.

Rule 7 of the Federal Rules of Appellate Procedure required Bootstrap to file a cost bond on appeal "with the notice of appeal". (App. A, p. 1.) The cost bond filed by Bootstrap on June 20, 1972 in response to the court's order of June 12, 1972 (Pet. App. G, p. 39)

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[3]Since Bootstrap never ordered the transcript or made arrangements for payment thereof at any time, it is irrelevant, for this purpose, whether the ten day period began to run from May 25, 1972, the date Bootstrap's notice of appeal was lodged and its abortive *in forma pauperis* motion was filed, or June 12, 1972, when its motion was withdrawn, or June 20, 1972, when its earlier lodged notice of appeal was filed.

[4]The principal and overriding default was failure to order or make arrangements to pay for the reporter's transcript which frustrated any further proceedings on appeal.

was void in that it failed to comply with the conditions required by Rule 7. (Pet. App. G, p. 40.)

Four days prior to the time when the record was required to be transmitted to the Court of Appeals, as reckoned by the District Court, Bootstrap filed its motion to extend the time.[5]

Bootstrap's motion in the district court for an extension of time to transmit the record was denied. The court reviewed the history of events from February 9, 1972, when Bootstrap's motion for a new trial had been denied, Bootstrap's motion to proceed *in forma pauperis*, and its motion to extend the time to transmit the record. In this connection, the court stated:

> "Supporting the plaintiff's motion to secure a transcript without payment of cost was only Mr. Kohn's (president of plaintiff corporation) affidavit. Defendants filed objections together with an affidavit and relevant information from Kohn's state court divorce action casting serious doubt upon the truthfulness of Kohn's affidavit as to his assets and inability to pay for a transcript. Mr. Kohn did not contest defendants' allegations and on June 12, 1972, plaintiff summarily withdrew its motion. The Notice of Appeal was filed June 20, 1972. A transcript was not ordered within ten (10) days thereafter. Rule 10(b) Federal Rules of Appellate Procedure.

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[5]The district court for cause shown had power to act only within 40 days from the filing of the notice of appeal. (Rule 11(d) Federal Rules of Appellate Procedure (App. A, pp. 5-6).) If the forty days began to run on June 12, 1972 when Bootstrap's motion for leave to appeal *in forma pauperis* "was determined" by its withdrawal, then even Bootstrap's motion lodged July 27, 1972 was too late. The district court, however, gave Bootstrap the benefit of the doubt when it assumed that the time began to run on June 20, 1972 when Bootstrap's earlier lodged notice of appeal was "filed". (Pet. App. G, p. 39.)

> In plaintiff's application for extension of time lodged on the thirty-seventh day after filing of the Notice of Appeal it is recited that the estimated cost of transcript is $2600.00 and that arrangements had been made to pay the entire $2600.00 in order to effectively 'order' the transcript. The Clerk's records indicate that on July 26, 1962, Kohn deposited with the Clerk the sum of $2400.00 to be held for payment of the transcript. The transcript has still not been effectively 'ordered'.
>
> It is ordered that the motion for extension of time to file transcript is denied." (Pet. App. F, pp. 8-9.)

Bootstrap then filed a motion in the Court of Appeals for an order to docket the appeal out of time.[6]

Phoenix Tallow and Maricopa filed motions to dismiss the appeal under Rules 12(c) and 3(a) of the Federal Rules of Appellate Procedure. With the full and complete record before it, the court denied Bootstrap's motion to docket the appeal out of time and granted respondents' motion to dismiss the appeal under Rule 12(c) which provides that an appeal shall be dismissed "if the appellant shall fail to cause timely transmission of the record or to pay the docket fee. . . ." (App. A, p. 8.)[7]

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[6]This was the only relief requested in Bootstrap's motion.

[7]On September 14, 1972 when the Court of Appeals entered its first order it had before it (a) all of the arguments presented by Bootstrap in support of its motion for an extension of time to file the record, (b) the Maricopa motion to dismiss and Bootstrap's opposition thereto, and (c) the motion to dismiss by Phoenix Tallow which substantially duplicated the Maricopa motion. Bootstrap's response to the Phoenix Tallow motion, which was filed on September 14, 1972, was reconsidered by the Court of

ARGUMENT.

The Court of Appeals denied Bootstrap's motion to docket the appeal out of time and granted respondents' motions to dismiss the appeal on the express grounds of Rule 12(c) of the Federal Rules of Appellate Procedure. The undisputed facts presented to the Court of Appeals were:

1. That Bootstrap failed to order the reporter's transcript timely, or at all and failed to make satisfactory arrangements with the reporter for payment of the cost of the transcript, in violation of Rule 10(b).[8]

2. That Bootstrap had failed to timely transmit the record or to make it possible to transmit the record on appeal within the time required by Rule 11(a).

3. That Bootstrap had failed to timely docket the appeal in the Court of Appeals without any lawful reason in violation of Rule 12(a).

4. That Bootstrap had failed to timely post a bond required by the rules but, instead, had posted a bond that was void on its face, in violation of Rule 7.

Appeals so that *all* of its arguments were given due attention. The court treated Bootstrap's second opposition as a motion to set aside its order of September 14, 1972 and reaffirmed its decision dismissing the appeal. (Pet. App. B, p. 2.)

[8]Although counsel later stipulated that the record, when prepared, could be retained in Phoenix pending the writing of briefs, Rule 11(c) expressly provided that in such event, the appellant must comply with Rule 12(a) (docketing) "and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries accompanied by a certificate of counsel for the appellant . . . reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal." (Rule 11(c), Federal Rules of Appellate Procedure. (App. A, p. 5).) Bootstrap's acts and omissions made compliance with Rule 11(c) impossible.

Clearly, on this record, the Court of Appeals had the discretion under Rule 12(c) to dismiss Bootstrap's appeal. Many other cases have held that the failure to transmit the record on appeal within the time limits provided by the rules fully warrants an appellate court in dismissing an appeal. *Tucker Products Corporation v. Helms,* 171 F.2d 126 (9th Cir. 1948); Cert. den. (1949) 336 U.S. 938, 69 S. Ct. 748, 93 L. ed. 1096; *United States v. Stanton,* 172 F.2d 642 (9th Cir. 1949); *Maghan v. Young,* 154 F.2d 13 (D.C. 1946); *United States v. Krause,* 197 F.2d 329 (9th Cir. 1952); *Fong v. James W. Glover, Ltd.,* 197 F.2d 710 (9th Cir. 1952); *United States v. Fujisaki,* 198 F.2d 747 (9th Cir. 1952); *Hagan v. Whitman,* 356 F.2d 742 (9th Cir. 1966); *United States v. Lathrop,* 199 F.2d 954 (9th Cir. 1952); and *Hargraves v. Bowden,* 217 F.2d 839 (9th Cir. 1954).

The appeals were dismissed in each of these cases although none of them involved as many braaches of the rules as were committed by Bootstrap in the instant case. Thus, in *Tucker Products Corporation v. Helms, supra, United States v. Stanton, supra, Maghan v. Young, supra* and *United States v. Fujisaki, supra,* the only breach of the rules established was the failure to timely transmit the record. There was no showing, for example, as in the instant case, that, in addition, the appellant had failed to order or pay for the reporter's transcript. Nor were the breaches of the rules in the cases cited above as flagrant and as unjustifiable as those committed by Bootstrap in the instant case. As was evident from the documents filed in the District Court, the judgment on the directed verdict was granted on February 1, 1972 and Bootstrap's motion for a new trial was denied on May 8, 1972. Bootstrap

first adopted the stratagem of attempting to have the United States Government pay for its appeal by filing a frivolous motion for leave to appeal *in forma pauperis,* without any proof that substantial stakeholders in Bootstrap's assets could not finance the appeal, and with an affidavit by its president which was so flimsy that when an opposing affidavit was filed attacking its truthfulness, Bootstrap did not contest the allegations and summarily withdrew its motion. When this ploy failed, Bootstrap continued to delay the determination of the appeal by failing to order the transcript or to pay the court reporter.

Thereafter, the record discloses that Bootstrap made no application for an extension of time to transmit the record on appeal until after the trial court had lost jurisdiction. Thus, Bootstrap's motion for an extension of time in the trial court was lodged sixty-three days after its motion for leave to appeal *in forma pauperis* was filed on May 25, 1972, and forty-five days after its motion to appeal *in forma pauperis* was withdrawn on June 12, 1972. Thus it was clearly filed out of time.[9]

Bootstrap's failure to timely docket the appeal in the Court of Appeals and the filing of a void bond have already been described.

Thus, in the face of the long line of decisions wherein appellate courts have dismissed appeals only for failure to timely transmit the record and the undeniable applicability of those decisions to the facts in the in-

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[9]Bootstrap contends that the filing of a motion to appeal *in forma pauperis* is the legal equivalent of filing of a notice of appeal. (See authorities cited in footnote 2 *infra*). Determination of that motion, by its withdrawal, would clearly start the running of the 40-day jurisdictional period during which the trial court is authorized to extend time for transmittal of the record. Rule 11(c), Federal Rule of Appellate Procedure.

stant case, the petition is clearly blind when it asserts that the "Question Presented" is whether the court below "departed from *accepted* and *usual* judicial practice . . ." by granting the instant motion to dismiss the appeal. Indeed, the decision below was inevitable.

Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695 (1947), the principal case relied upon by Bootstrap, in fact supports the Court of Appeals here. This Court reiterated the principle that the earlier version of Rule 12(c), *i.e.,* old Rule 73(a) "is intended to place reliance upon the sound discretion of the Circuit Court of Appeals". (330 U.S. 695, at 704.) It was precisely the exercise of that same discretion to which reference was made in *Pyramid Motor Freight Corp., supra,* in accordance with the long line of decisions cited earlier, which led the court below to dismiss Bootstrap's appeal.

The petition is wrong when it devotes itself to an endless, and irrelevant discussion of Bootstrap's version of the evidence in the lengthy trial in the District Court. As shown by its motion for directed verdict, Respondent denied and denies that any violation of Section 1 or Section 2 of the Sherman Act was established below, even *prima facie*. The petition is also clearly wrong in its distorted version of what Bootstrap asserts are substantial questions on the merits which might have been litigated on the appeal if the rules on appeal had been followed, not flaunted.[10]

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[10]The directed verdict in the District Court was based, in substantial part, upon the simple proposition that Bootstrap failed

Bootstrap having clearly violated the rules on appeal, the court below had the discretion to determine whether it would dismiss the appeal. It had all the facts before it. After balancing all of the issues, the court held that the appeal should be dismissed. That decision was clearly within its power and was even more clearly correct.

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to offer any proof that it was injured or damaged in its business or property. It was conceded on stipulated facts that the unit cost of operation of Bootstrap's plant, because of its inefficient design and inexperienced management, was far greater than the per unit cost of operation of its competitors. Bootstrap's damage problem was similar to that of an owner who breeds a three legged horse and mounts it with a Russian weight lifter. That owner cannot claim the Kentucky Derby prize as damages, no matter what its proof that the four legged horse owners prevented it from competing. All the evidence in the world as to purses earned or times run by four legged horses would not permit a trier of fact to award a single dollar to the owner of a three legged horse. No "expert" would be permitted to testify that a three legged horse could beat Man-a-War regularly. The trial court thus directed a verdict, in part, upon the grounds that the "evidence" relied upon by Bootstrap had no rational relationship to the damage which it sought. The court's decision was in accordance with a long line of decisions to the same effect. Thus, the so-called "substantial questions" and the decisions pertaining thereto referred to in the petition, pages 24 through 30, are and would have been totally inapplicable. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, (9th Cir. 1969) 416 F.2d 71; *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (2 Cir. 1962) 297 F.2d 906; *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.* (6 Cir. 1962) 308 F.2d 383; *Emich Motors Corp. v. General Motors Corp.* (7 Cir. 1950) 181 F.2d 70, modified on other grounds (1951) 340 U.S. 558; *Wolfe v. National Lead Company* (9 Cir. 1955) 225 F.2d 427; *Flintkote Co. v. Lysfjord*, (9 Cir. 1957) 246 F.2d 368; and *Lessig v. Tidewater Oil Co.* (9 Cir. 1964) 327 F.2d 459. Finally, Bootstrap's loss of its investment admittedly resulted from a fire and, as a matter of law, could not be the basis of a claim against its competitors.

Conclusion.

The decision below is thus consistent with the authorities and plainly right. No basis for review by this court has been shown. The petition should therefore be denied.

Respectfully submitted,

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Of Counsel.

Dated: January 12, 1973.

APPENDIX A.

Federal Rules of Appellate Procedure.

Rule 7.

Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination of the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

Rule 10.

The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the dis-

trict court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall

be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstate-

ment be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 11.

Transmission of the Record

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangement

with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause shown may extend the time for transmitting the rec-

ord. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(e) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties That Parts of the Record Be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

Rule 12.

Docketing the Appeal; Filing of the Record.

(a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the

action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing of the Record. Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11(c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.